162 U.S. 346

TRANSCRIPT OF RECORD.

162-346

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 153.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL PETERSON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 29, 1892.

(15,116.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1895.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May session, 1892, of the October term, 1891, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in May, to wit, the second day of May, A. D. 1892, before the Honorable Walter H. Sanborn, circuit judge, and Honorable Oliver P. Shiras and Honorable Amos M. Thayer, district judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twelfth day of December, A. D. 1891, a transcript of record in pursuance to a writ of error directed to the circuit court of the United States for the district of Minnesota was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the words and figures following, to wit:

1 United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the clerk of the above-named court.

SIR: Please issue a writ of error to the United States circuit court of appeals for the eighth circuit, in the above-entitled action, and oblige,

Yours truly, TILDEN R. SELMES,
Attorney for Defendant.

Indorsed: Ent. No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* N. P. R. R. Co., defendant. Precipe for writ of error. Filed Oct. 14, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Minnesota, fourth division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, at Minneapolis, Minnesota, before you at the September term, 1891, thereof, between Samuel Peterson as plaintiff and The Northern Pacific Railroad Company as defendant, a manifest error hath happened to the great damage of the said defendant, The Northern Pacific Railroad Company, as by defendant's complaint appears, we being willing

that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 13th day of December, 1891, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to
2 correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 14th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

The Seal of United States Circuit Court of the United States, District of Minnesota, Fourth Division.

Issued at office in Minneapolis, with the seal of the circuit court and dated as aforesaid.

OSCAR B. HILLIS,
Clerk of the Circuit Court, District of Minnesota.

Allowed by—
R. R. NELSON, *Judge.*

United States circuit court of appeals, eight- circuit. Northern Pacific R. R. Co., plaintiff in error, *vs.* Samuel Peterson. Writ of error. Original. Tilden R. Selmes, att'y for plaintiff in error.

UNITED STATES OF AMERICA, } *ss:*
District of Minnesota, Fourth Division, }

In obedience to the command of the within writ I hereby transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case with all things concerning the same.

In witness whereof, I hereto subscribe my name and
[SEAL.] affix the seal of the United States circuit court, district of Minnesota, fourth division.

OSCAR B. HILLIS, *Clerk,*
By C. C. WEBSTER, *Deputy.*

UNITED STATES OF AMERICA.

To Samuel Peterson, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, 60 days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the U. S. circuit court, district of Minnesota, fourth division,

wherein Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error
3 as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of circuit court, eighth circuit this 14th day of October, A. D. 1891.

HENRY C. CALDWELL,
Judge of U. S. Circuit Court, Eighth Circuit.

Indorsed: Ent. case No. 35. United States circuit court of appeals, eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* Samuel Peterson. Citation. The service of the within citation admitted this 14th day of October, 1891. Gjertsen & Rame, attorneys for defendant in error. Tilden R. Selmes, attorney for plaintiff in error. Returned and filed Nov. 13, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court for the District of the State of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Plaintiff for his cause of action against the defendant alleges:

That plaintiff was born in the Kingdom of Sweden and is and was during all the time hereinafter mentioned an alien and the subject of the King of Sweden and Norway.

That the defendant is and was during all the time herein mentioned a corporation duly organized, as provided by law, and engaged in the operation and maintaining of railroads and railways in the city of Minneapolis, in said State, and throughout the State of Minnesota and other States in the Union, having its general office in the State of Minnesota.

That on or about the 15th day of July, 1890, the defendant engaged plaintiff at the Northern Pacific junction in the State of Minnesota, to work as a section-hand upon defendant's road and to keep the tracks of the defendant in repair for the operation of freight and passenger trains over the same.

That as a part of the contract of hiring the defendant engaged to carry the plaintiff to and from his work upon defendant's road as the occasion would require in a safe and proper manner.

It was the duty of the defendant to employ and retain in his employ competent and suitable persons and servants to perform said work of keeping defendant's tracks in repair.

4 That yet the defendant, not regarding it- duty in that behalf, conducted itself so carelessly, negligently and unskilfully that on or about the 19th day of August, 1890, while plaintiff was in the employ of the defendant as aforesaid, and being trans-

ported from his work to his home in the evening upon one of defendant's hand cars, being then and there operated over the railroad track of the defendant and under the control and supervision of said defendant and its vice-principal, said defendant and its vice-principal so carelessly, negligently and unskilfully operated said hand car and through the incompetence of the vice-principal then in charge of defendant's work, and the immediate superior of this plaintiff, that the same was suddenly brought to a stand-still, and another hand car, operated by defendant for the same purpose of conveying its employés, came up upon said track at a high rate of speed from behind the car upon which plaintiff was being conveyed and ran into and upon the hand car, as aforesaid, upon which plaintiff was being carried, and thereby plaintiff was thrown over from off said hand car of defendant upon said track, thereby breaking plaintiff's left foot and otherwise injuring plaintiff.

That through the carelessness, negligence, of said defendant and the incompetence of defendant's vice-principal in the operation and management of said car, said defendant permitted its second hand car, which was being operated in the same direction as the one upon which plaintiff was being carried upon said track to run into and upon the hand car upon which plaintiff and the employés of the defendant *was* being transported, and thereby throwing plaintiff upon the track of the defendant and caused the said car to run over plaintiff's said leg and breaking the same as aforesaid.

That by reason of the aforesaid carelessness, negligence, unskillfulness, omissions and commissions on the part of the defendant plaintiff was injured, as aforesaid, and has endured great bodily and mental suffering, and will for a long time suffer great bodily and mental pain, and has for a long time remained ill, and was for a long time prevented from persuing his business, and will for the remainder of his natural life, by reason of said injury, be prevented from attending to his business as he was able to do before said injury, and was otherwise damaged in the sum of five thousand dollars.

Wherefore plaintiff demands judgment against said defendant for the sum of five thousand dollars, together with his costs and disbursements of this suit.

Dated Dec. 18th, 1890.

GJERTSEN & RAND,
Attorneys for the Plaintiff.

5 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Samuel Peterson came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

SAMUEL PETERSEN.

Subscribed and sworn to before me on this 18th day of December, A. D. 1890.

[NOTARIAL SEAL.] HENRY J. GJERTSEN,
Notary Public, Hennepin Co., Minn.

Indorsed: Ent. case No. 35. District of the State of Minnesota, fourth division. U. S. circuit court. Samuel Peterson, plaintiff, *vs.* N. P. Railroad Company, defendant. Original complaint. Filed April 28, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Gjertsen & Rame, attorneys-at-law, 47 Washington Ave., S. Minneapolis, Minn.

Summons.

UNITED STATES OF AMERICA, } ss:
District of Minnesota, Fourth Division, }

In the Circuit Court of the United States for the District of Minnesota.

SAMUEL PETERSEN, Plaintiff,
against
NORTHERN PACIFIC RAILWAY COMPANY, Defendant.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Minneapolis, county of Hennepin, and State of Minnesota, and file your answer in said clerk's office, within 20 days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained; besides the costs and disbursements of this action.

6 For the marshal of the district of Minnesota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of April, A. D. 1891. Issued at my office in the city of Minneapolis, under the seal of said circuit court, the day and year last aforesaid.

Seal of U. S. Circuit Court.

OSCAR B. HILLIS, *Clerk,*
By C. C. WEBSTER, *Deputy.*
GJERTSEN & RAND,
Plaintiff's Attorneys.

Indorsed: Ent. case No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Peterson, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Summons. Service admitted this 29th day of April, A. D. 1891. Tilden R. Selmes, ass't

counsel. Returned and filed May 2, A. D. 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Gjertsen & Rame, plaintiff's attorneys.

DISTRICT OF MINNESOTA, *ss:*

I hereby certify and return that I made due service of the within summons upon the N. P. Railroad Company on the 29th day of April, 1891, at St. Paul, in said district, by leaving with T. R. Selmes, ass't counsel for said R. road, a true and certified copy thereof, personally.

J. C. DONAHOWER,
U. S. Marshal,
By A. B. BROCKETT,
Deputy U. S. Marshal.

United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSEN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Defendant answering the complaint of the plaintiff herein admits that it is a corporation organized under the laws of the United States and engaged in the operation of a railroad, substantially as alleged in said complaint; it admits that the plaintiff was, on or about the 15th day of July, 1890, in its employ; it admits that the plaintiff was injured on or about the 15th day of July, 1890, but denies that it has any knowledge or information sufficient to
7 form a belief as to the character, extent or nature of said injury. Further answering, defendant denies each and every allegation in said complaint contained and every part thereof, except as hereinafter expressly admitted, qualified or denied, and specially denies that by reason of any of the matters or things in said complaint contained said plaintiff has been damaged in the sum of five thousand dollars ($5,000), or any other sum whatsoever.

Further answering defendant alleges that the injuries, if any, received by the plaintiff were caused solely by his (plaintiff's) own carelessness and negligence, and not otherwise.

Therefore, defendant prays that it may be hence dismissed with its costs and disbursements incurred in this action.

Dated May 10th, 1891.

JNO. C. BULLITT, JR., AND
TILDEN R. SELMES,
Defendant's Attorneys, St. Paul, Minn.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

Tilden R. Selmes, being duly sworn, says that he is an officer, to wit: assistant counsel of the defendant herein; that he has read the

foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me this 19th day of May, A. D. 1891.

EDWIN IRLE,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

Indorsed: Ent. No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* Northern Pacific Railroad Company, defendant. Answer. Filed May 19, 1891. Oscar B. Hillis, clerk, by S. L. Truessell, deputy. John C. Bullitt, Jr., and Tilden R. Selmes, attorneys for defendant, St. Paul, Minn.

8 Circuit Court of the United States, District of Minnesota, Fourth Division.

SAMUEL PETERSEN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Reply.

Plaintiff replying to the answer of the defendant:

Denies that said injury was the result of any negligence on the part of the plaintiff, or that he contributed in any manner to said injury.

Further replying plaintiff specifically denies each and every allegation, matter and thing in said answer contained not hereinbefore specifically denied.

Wherefore plaintiff demands judgment as prayed for in the complaint.

GJERTSEN & RAND,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

Henry J. Gjertsen came before me and being first duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that he knows the contents of the foregoing reply, and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by affiant is that plaintiff is absent from the county where resides this affiant.

HENRY J. GJERTSEN.

Subscribed and sworn to before me this 8th day of June, A. D. 1891.

S. M. RAND,
Notary Public, Hennepin County, Minn.

Indorsed: Ent. No. 35. District of the State of Minnesota, county of Hennepin. Circuit court of the United States. Samuel Petersen, plaintiff, *vs.* N. P. Railroad Co., defendant. Reply. Filed June 8, 1891. Oscar B. Hillis clerk, by C. C. Webster, deputy. Gjertsen & Rame, attorneys-at-law, 47 Washington avenue, S. Minneapolis, Minn.

United States Circuit Court for the District of the State of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Plaintiff by permission of court and consent of defendant do-hereby for his amended complaint against the defendant allege:

9 That plaintiff was born in the Kingdom of Sweden, and is and was during all the time hereinbefore mentioned an alien and subject of the King of Sweden and Norway.

That the defendant is, and was during all the time hereinafter mentioned a corporation duly organized as provided by law, and engaged in the operation and maintenance of railroads and railways throughout the State of Minnesota and in the fourth division thereof, and other States in the Union, having its general office and agents and officers, upon which lawful service of process of said court can be made in said division.

That on or about the 15th day of July, 1890, the defendant engaged plaintiff at Popolor, in the State of Wisconsin to work as a section hand upon defendant's road, and to keep the track of the defendant in repair for the operation of freight and passenger trains over the same.

That as a part of the contract of hiring, the defendant engaged to carry the plaintiff to and from his work upon defendant's road as the occasion would require, in a safe and proper manner.

It was the duty of the defendant to employ and retain in its employ competent and suitable persons, servants and foreman, to perform said work of keeping defendant's tracks in repair, and to keep the hand cars, used in and about the business of defendant, and in transporting plaintiff to and from his work, in good repair.

That yet, the defendant, not regarding its duty in that behalf, conducted itself so carelessly, negligently and unskillfully, that on or about the 19th day of August, 1890, while plaintiff was in the employ of the defendant as aforesaid, and being transported from his work to his home in the evening upon one of the defendant's hand cars, being then and there operated over the railroad track of the defendant, and under the control and supervision of said defendant and its vice-principal, said defendant and its vice-principal so carelessly, negligently and unskillfully operated said hand car, and through the incompetence of the vice-principal, then in charge of defendant's work, and the immediate superior of this plaintiff,

that the same was suddenly brought to a stand-still, and another hand car, operated by defendant for the same purpose of conveying its employés, came upon said track at a high rate of speed from behind the car upon which plaintiff was being conveyed, and run into and upon the hand car as aforesaid, upon which plaintiff was being carried, and thereby plaintiff was thrown over from off said hand car of defendant upon said track and run over by said second hand car, thereby breaking plaintiff's left foot and otherwise injuring plaintiff.

That the said second car of the defendants was out of repair and defective, in this, that the brake thereof was worn out and of little use, and by reason thereof the speed of said second car, coming after the car upon which plaintiff was being transported, could not be control-ed by the operators, and the same was insufficient and unsuitable for the purpose to which the same was used by defendant, as aforesaid, all of which defendant had due notice and was fully advised that said second car was defective, as aforesaid.

That through the carelessness and negligence of said defendant and the incompetence of defendant's vice-principal in the operation and management of said first car, said defendant permitted his second hand car, which was being operated in the same direction as the one upon which plaintiff was being carried upon said track, and was defective as aforesaid, and operated up a high rate of speed, to run into and upon the hand car upon which plaintiff and other employés of the defendant was being transported, and thereby throwing plaintiff upon the track of the defendant and caused the same second hand car to run over plaintiff's said leg, breaking the same, as aforesaid.

That by reason of the aforesaid carelessness, negligence, unskillfulness, omissions and commissions on the part of the defendant and by reason of the defective hand car, as aforesaid, plaintiff was injured as aforesaid, and has endured great bodily and mental suffering, and will for a long time suffer great bodily and mental pain, and has for a long time remained ill, and was for a long time prevented from pursuing his business, and will for the remainder of his natural life, by reason of said injury, be prevented from attending to his business as he was able to do before said injury, and was otherwise damaged in the sum of five thousand dollars.

Wherefore plaintiff demands judgment against said defendant for the sum of five thousand (5,000) dollars, together with the costs and disbursements of this suit.

Dated Sept. 8th, 1891.

GJERTSEN & RAND,
Attorneys for the Plaintiff.

Indorsed: Ent. case. No. 35. Circuit court United States, district of Minnesota, fourth division. Samuel Peterson *vs.* Northern Pacific R. R. Co. Amended complaint. Filed Sept. 8th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Gjertsen & Rame, att'ys for pl't'ff.

11 United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Amended Answer.

Defendant for an amended answer to the amended complaint of the plaintiff herein, admits that it is a corporation organized under the laws of the United States, and engaged in the operation of a railroad substantially as alleged in said complaint; it admits that the plaintiff was on or about the 15th day of July, 1890, in its employ; it admits that the plaintiff was injured on or about the 15th day of July, 1890, but denies that it has any knowledge or information sufficient to form a belief as to the character, extent or nature of said injuries. Further answering defendant denies each and every allegation in said complaint contained and every part thereof except as hereinbefore expressly admitted, qualified or denied, and specifically denies that by reason of any of the matters or things in said complaint contained said plaintiff has been damaged in the sum of five thousand ($5,000) dollars or any other sum whatsoever.

Further answering, defendant alleges that the injuries, if any, received by the plaintiff were caused solely by his (plaintiff) own negligence and carelessness, and the negligence and carelessness of his fellow-servants and employés engaged in the same employment with him, and not otherwise.

Wherefore, defendant prays that it may be hence dismissed with its costs and disbursements incurred herein.

JOHN C. BULLITT, JR.,
TILDEN R. SELMES,
Defendant's Attorneys.

St. Paul, Minn.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

Tilden R. Selmes, being duly sworn, says that he is an officer, to wit: assistant counsel of the defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

TILDEN R. SELMES.

12 Subscribed and sworn to before me, this 9th day of September, A. D. 1891.

EDWIN IRLE,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

Indorsed: Ent. case No. 35. U. S. circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* Northern Pacific R. R. Co., defendant. Amended answer. Filed Dec. 10, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Jno. C. Bullitt, Jr., and Tilden R. Selmes, attorneys for defendant, St. Paul, Minn.

United States Circuit Court, District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1891.

SEPTEMBER 1ST, 1891.

Pleas before the circuit court of the United States of America for the fourth division in and for the district of Minnesota, at a stated term of said court begun and held at Minneapolis, pursuant to an act of Congress, on the first Tuesday of September, being the first day of September, A. D. 1891.

Present: Hon. Henry C. Caldwell, U. S. circuit judge; Hon. Rensselaer R. Nelson, U. S. dist. judge; Eugene G. Hay, U. S. dist. attorney; J. C. Donahower, U. S. marshal; Oscar B. Hillis, clerk.

The court was duly opened and proclamation made.

* * * * * * *

Term Minutes, September Term, A. D. 1891.

SEPTEMBER 8TH, 1891—Tuesday morning.

Court opened pursuant to adjournment.

Present: Hon. Henry C. Caldwell, circuit judge; Hon. Rensselaer R. Nelson, dist. judge.

* * * * * * *

SAMUEL PETERSEN
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } No. 35.

Before Judge Caldwell.

This cause being regularly called for trial, the plaintiff appears by his attorneys, Gjertsen & Rand, and defendant by its attorney, Tilden R. Selmes.

13 Thereupon it is ordered by the court that a jury come, to wit: Henry Reiskoff, H. A. Wilson, C. L. Mayham, A. D. Cheney, R. E. Cole, Frank Sellen, John C. McLaughlin, O. N. Grue, Louis Maish, John W. Clover, Frank McNerney, Louis A. Runge, twelve good and lawful men, who are duly sworn to try the issues joined in this cause; and the trial of the same is proceeded with as follows:

Henry J. Gjertsen opens the case for the plaintiff.

Samuel Peterson is sworn and examined as a witness in his own behalf.

John Lund is sworn and examined as a witness for plaintiff.

Pete Nelson is sworn and examined as a witness for plaintiff.

Samuel Peterson is recalled and examined as a witness for plaintiff.

Dr. W. T. Moore is sworn and examined as a witness for plaintiff.

Here the plaintiff rests his case.

Tilden R. Selmes opens the case for the defendant.

H. H. Halvorson is sworn and examined as a witness for defendant.

Dr. P. Foster is sworn and examined as a witness for defendant.

And here the defendant rests its case.

And the trial of said cause not being concluded at the hour of adjournment, it is by the court ordered that further proceedings herein be and the same hereby are postponed until tomorrow morning.

* * * * * * *

Ordered that this court do now adjourn till 10 o'clock tomorrow morning.

HENRY C. CALDWELL,
Circuit Judge.

Term Minutes, September Term, A. D. 1891.

SEPTEMBER 9TH, 1891—Wednesday Morning.

Court opened pursuant to adjournment.

Present: Hon. Henry C. Caldwell, circuit judge; Hon. Rensselaer R. Nelson, district judge.

* * * * * * *

14 SAMUEL PETERSEN *vs.* NORTHERN PACIFIC RAILROAD CO. } No. 35.

Before Judge Caldwell.

This day again came the parties herein, also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:

Tilden R. Selmes sums up the case for defendant.

Henry J. Gjertsen sums up the case for plaintiff.

The court charges the jury. An officer is sworn to take charge of the jury and they retire to consider of their verdict.

After due consideration concerning the same and being fully advised in the premises, they find and return into court by their foreman, their verdict, to wit:

"We, the jury, find for the plaintiff and assess his damages at $2,500.

O. N. GRUE, *Foreman.*"

It is thereupon considered, ordered and adjudged by the court that the plaintiff, Samuel Peterson, do have and recover of and from the defendant, The Northern Pacific Railroad Company, the

aforesaid sum of twenty-five hundred dollars ($2,500) so found to be due by the jury, together with his costs and disbursements of this action, to be taxed, and that he have execution therefor.

Upon motion of Tilden R. Selmes, Esq., attorney for defendant, it is by the court ordered that execution upon the judgment entered in this cause be and the same hereby is stayed for the period of 42 days from and after this date.

* * * * * * *

HENRY C. CALDWELL,
Circuit Judge.

U. S. circuit court, district of Minnesota, fourth division, Samuel Peterson *vs.* N. P. R. R. Co. Term minutes. Vol. 1, pages 68, 88, 89, 90, 91.

Requests for the Defendant.

1. The court instructs the jury to bring in a verdict for the defendant.

2. If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Halvorsen, the foreman of the extra gang, then in that case the negligence was the negligence of a fellow-servant of the plaintiff, and your verdict must be for the defendant.

3. If the jury believe from the evidence that the proximate, sole and immediate cause of the accident resulting in plaintiff's injuries was the failure of the fellow-servants of plaintiff on the rear hand car to keep a proper lookout or to keep the second car a sufficient distance from the first hand car, then in that case your verdict must be for the defendant.

4. If the jury believe from the evidence that the rules and regulations of the company required the persons on the rear hand car to keep it at a sufficient distance from the first car to avoid a collision in case the first car was suddenly stopped, then in that case your verdict must be for the defendant.

5. If the jury believe from the evidence that the sole, proximate and immediate cause of the accident was the negligence of the men on the rear, then in that case your verdict must be for the defendant.

Indorsed: Ent. No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Petersen *vs.* N. P. R. R. Co., defendant. Defendant's requests. Filed Sept. 9th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Defendant above named hereby objects to the taxation of witness fees contained in the notice of taxation of costs served upon the said defendant in this action upon the ground that the mileage taxed each of said witnesses, John Lund, Peter Mattson and Dr. J. T. Moore, is itemized in said notice of taxation of costs at the sum of six cents per mile, whereas in this court mileage is only payable at the rate of five cents per mile.

Dated Sept. 22d, 1891.

JNO. C. BULLITT, JR.,
Defendant's Attorney, St. Paul, Minn.

Indorsed: Ent. Case No. 35. U. S. circuit court, dist. of Minn., fourth division. Sam'l Peterson *vs.* N. P. R. R. Co. Objections to taxation of costs. Filed Sept. 23, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Jno. C. Bullitt, Jr., def't's att'y. St. Paul, Minn.

16 United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
against
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Amount of judgment or verdict $2,500 00

Costs and Disbursements.

Statutory costs, district fees	$20 00	
Four affidavits	1 00	
Marshall's fees	2 60	
Clerk's fees	15 45	
		$39 05

Witness Fees.

Names.	Residence.	No. days' attendance.	No. M. tr'v'l'd.		Allowed.
John Lund	West Springs, Wis.	3	320	$23 70	20 50
Peter Mattson	West Springs, Wis.	3	320	23 70	20 50
Dr. J. T. More	Minneapolis. Minn.	1	2	1 62	1 60
					81 65

Total amount $2,581 65

Dated Sept. 24, 1891.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.

STATE OF MINNESOTA, *County of Hennepin*, } *ss:*

Affidavit of Disbursements.

Henry J. Gjertsen, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that the

foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above-entitled action, and that all of the items thereof have been actually and necessarily paid or incurred therein, by and on behalf of said plaintiff; and that each of the above-named witnesses was a material witness for the plaintiff in said action, and that he necessarily traveled the number of miles set opposite his name, going from his said place of residence to and returning from the place of trial, and necessarily attended the number of days set opposite his said name.

HENRY J. GJERTSEN.

Subscribed and sworn to before me, this 21st day of Sept., 1891.

[NOTARIAL SEAL.] L. M. RAND,
Notary Public, Minn.

17 District of Minnesota, United States Circuit Court, Fourth Division.

SAMUEL PETERSEN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of Taxation of Costs.

SIR: Please take notice, that on the 24th day of Sept., 1891, at 10 o'clock, a. m., application will be made to Oscar B. Hillis, Esq., clerk of said court at his office in the United States post office, in the city of Minneapolis, in the county of Hennepin, and State of Minnesota, to have the written bill of costs and disbursements taxed and inserted in the judgment then and there to be entered herein.

Dated Sept. 21, 1891.

Yours respectfully, GJERTSEN & RAND,
Attorneys for Plaintiff.

To John C. Bullitt, Jr., and Tilden R. Selmes, attorneys for defendants.

Indorsed: Ent. case No. 35. Circuit court United States, dist. of State of Minn., 4th div. Samuel Peterson *vs.* N. P. R. R. Co. Notice of taxation of costs, and bill of costs and disbursements. Due service of the within bill of disbursements and affidavit to same, and notice of taxation thereof is hereby admitted, this 22d day of Sept., 1891, at St. Paul. John C. Bullitt, Jr., and T. R. Selmes, attorneys for defendant. Filed Sept. 22d, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action came on for trial before Hon. Henry C. Caldwell, judge of the United States circuit court for the eighth circuit, at a

regular term of the United States circuit court, held at Minneapolis, Minnesota, on the eighth day of September, A. D. 1891.

Gjertsen & Rand appeared for the plaintiff and John C. Bullitt, Jr., and Tilden R. Selmes appeared for the defendant.

18 A jury is duly empaneled and sworn, and the case on the part of the plaintiff is opened to them by Mr. Gjertsen.

It is admitted that the accident upon which this action is based occurred in the State of Wisconsin.

Plaintiff's counsel now calls as a witness SAMUEL PETERSON, who, being duly sworn on his own behalf as the plaintiff, testifies as follows:

Examination-in-chief by Mr. GJERTSEN:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. At what time did you engage in the employ of the defendant company?

A. I think it was about the 20th or 21st of July; I am not certain about it.

Q. Of last year?

A. Certainly.

Q. Who hired you?

A. Henry Holverson.

Q. At what place were you?

A. Poplar, in the State of Wisconsin.

Q. Who was Henry Holverson?

A. He was foreman of an extra gang.

Q. What particular work did he have under his control?

A. He was repairing the track—putting in ties and so forth.

Q. Over what particular part of the road?

A. It was over three sections that he was working.

Q. Running out from what place?

A. From a place called Little Canada down to Old Superior.

Q. From Old Superior to Little Canada?

A. Yes, sir.

Q. He had charge on that part of the road?

A. He did any work that was to be done on that part of the road.

Q. What was said with regard to your wages at that time?

A. One dollar and seventy-five cents a day and $4 a week for board.

Q. What was said in regard to going to work and coming back, if anything?

A. They told us that morning there was a hand car for you boys to take and go out with me.

Q. He told you you would go out on that hand car?

A. Yes, sir.

Q. Was there any one else that had anything to do with your crew?

19 A. No; not as far as I am concerned.

Q. Do you know in whose employ Henry Holverson was?
A. In the employ of the Northern Pacific railroad.
Q. In the defendant's employ?
A. Yes, sir.
Q. What kind of work were you to do under your contract of employment?
A. I was putting in ties just the same as the rest of them.
Q. Putting in ties?
A. Yes, sir.
Q. That was the work of your crew?
A. Yes, sir.
Q. And repairing the track?
A. And repairing the track.
Q. Was this an old road or a new road?
A. It was an old road.
Q. It had been in operation some time?
A. Yes, sir.
Q. Who furnished you with your tools?
A. Henry Holverson did.
Q. How long did you continue in the employ of the company? How long did you work for the company?
A. I worked from that time on until the 19th day of August, when I was hurt.
Q. Until the 19th day of August?
A. Yes, sir.
Q. During that time how large a crew did Mr. Haverson have under his supervision?
A. I think there was about 14 of us; 13 of us; 14 with him.
Q. During that time from the time that he engaged you until you got hurt, who was in charge of this crew?
A. Henry Holverson.
Q. Was there any one else in charge of it?
A. No, sir.
Q. Who gave you directions as to what work you were to do, and how you were to do it?
A. Henry Holverson; he told us how to do the work.
Q. State whether or not there were other men working under other bosses on the road, on the same section.
A. Yes, sir; there was sectionmen working under other section foremen.
Q. State, if you know, if Mr. Holverson gave those section foremen any direction as to what kind of work they were to do during the time you were engaged.

Objected to as immaterial, incompetent and irrelevant.
Objection overruled. Defendant excepts.

A. I heard one time he told the section foreman up by Poplar that he had better get up in the morning and fix up the
20 piece of work; the piece of track he was working on the day before.
Q. State, if you know, if Mr. Halvorsen hired any others of the

crew of which you were one. Did he hire any others of the men of this crew besides yourself?

A. Yes, sir.

Q. Whom did he hire?

A. There were six of us; I think there was six or eight; I don't remember which.

Q. Six or eight that were hired by him at the same time you were hired?

A. Yes, sir; right at the same time.

Q. State, if you know, if he fixed the compensation of the other men as well as your own. Did you hear the contract of hire between him and the other men?

A. Yes, sir; he told all of us, I will give you $1.75 a day, and there is $4 a week for board, he says.

Q. He told you he would give you $1.75 a day?

A. Yes, sir; he told that to all of us that came that night.

Mr. SELMES: They were to get $1.75 a day and $4 a week was to be taken out for board.

Q. Four dollars a week for your board was to be taken out of your wages by the company?

A. Yes, sir.

Q. Who kept your time?

A. Henry Holverson; he made up the pay-roll and the time-sheets.

Q. State, if you know, who discharged the men in your employ.

A. I know he discharged one man; his name was Ruell Nelson; that is what he told me after I was hurt.

Defendant's counsel moves to strike out the testimony of the witness as to what Ruel Nelson told him.

Stricken out without objection.

Q. How far did you have to travel each morning to get to your work?

A. Sometimes we had to go one mile, and sometimes three or four miles, and sometimes more than that.

Q. Who furnished your transportation from your lodging to *to* your work?

A. Well, the transportation was on hand cars.

Q. This defendant furnished the transportation?

A. Yes, sir.

Q. Was that the understanding when you engaged to work?

A. Yes, sir; we were to be transported on hand cars.

Q. How many hand cars were used by Mr. Holverson in transporting you to and from your work?

A. Two hand cars.

Q. What else was taken by these hand cars besides the men?

21 A. Sometimes we carried iron and sometimes we carried tools along with us, and most generally we had a barrel of water on the hand car.

Q. State whether you knew who managed the hand cars.

A. Henry Holverson did. He was standing on the front car.
Q. What car did he usually occupy?
A. The front car.
Q. The front car?
A. Yes, sir.
Q. Who gave you the signal to start?
A. He told us when to start.
Q. Mr. Holverson did?
A. Yes, sir.
Q. In the morning when you got out?
A. Yes, sir.
Q. And who ordered the cars to stop?
A. He did.
Q. Henry Holverson?
A. Yes, sir; he told us when to take them off.
Q. Who regulated the speed of the cars; how fast you were to travel?
A. He did.
Q. State whether or not at times he would order you to increase the speed of the cars.
A. It was lots of times. When we were running rather slow he would take hold of the handles and work himself at it.
Q. Would he say anything to you or the boys to increase the speed?
A. Yes, sir.
Q. On the day that you were injured where were you boarding or stopping?
A. I was stopping in Old Superior.
Q. How far did you have to travel in the morning to your work?
A. That morning I think we traveled about three miles. I should think it was about that.
Q. It was in the morning you got hurt?
A. Yes, sir.
Q. What time did you start home?
A. Six o'clock.
Q. That was towards Old Superior?
A. Yes, sir.
Q. How large a crew did you have at that time?
A. It was eight on the front car and six on the hind car.
Q. What position did Mr. Holversen occupy that evening?
A. He was standing on the front car where the brake was.
Q. Near the brake?
A. Yes, sir.
22 Q. Who operated the brake on the front car?
A. Mr. Holverson.
Q. Was that the usual way? State if any one else at any time operated the brake?
A. No; he attended to breaking the car and so on.
Q. Will you tell the jury just what occurred after you got started on your way home that night. Let me ask you one or two more

questions: Who were on the front car besides yourself and Mr. Holverson?

A. There was—I have forgotten the names of the boys.

Q. Give the names of those you remember?

A. Well, there was me and my brother, and Charlie Peterson, and John Lund, and Pete Mason, and John Gustafson and Emil Anderson; that's all I remember.

Q. Who gave the command to start up that evening?

A. Mr. Holverson did. He told us to put on the cars and go home.

Q. After starting up in that way what did you do?

A. They commenced to pump the cars and go home.

Q. What happened; tell the court and jury just exactly what occurred?

A. It was down to——

Q. How far had you traveled before you got hurt?

A. Oh, we had traveled about two miles, I think, or so; I don't remember exactly.

Q. Then what happened?

A. Then when we were in the city limits of Old Superior, he put on the brakes on this hand car.

Q. In what manner did he put on the brake?

A. He put it on and stopped the car.

Q. I asked you in what manner he put on the brakes; how did he do it? Was it done slowly or quickly?

A. Quickly.

Q. How far was the front car away from the hind car at the time he put the brake on?

A. About a rail-length and a half.

Q. About a rail-length and a half?

A. Yes, sir.

Q. How many feet are there in a rail?

A. Thirty feet.

Q. What did Mr. Holverson say at the time he put the brake on, if anything?

A. He didn't say anything; I don't remember that he said anything.

Q. Did he give any warning or give any orders to the hind car to stop?

A. No, sir.

Q. After he put on the brake, what happened?

A. The hind hand car came into our car and ours jumped the track and threw us right off.

23 Q. At what rate of speed were the two cars running at that time?

Mr. SELMES: We object to this question on the ground that the witness has not been shown to be competent to form an opinion as to the rate of speed of the cars.

Objection overruled.

Q. State, if you know, at what rate of speed it was being operated.

A. Somewhere between 12 and 15 miles an hour. It was over 12 miles an hour, anyway.

Q. Over 12 miles an hour?

A. Yes, sir.

Q. How long was it from the time that Holverson applied the brake to the front car until the second car ran into you?

A. Just a second.

Q. About a second?

A. Yes, sir.

Q. State what happened to you at that time.

A. I was thrown into the center of the track and the hand car ran over me and broke my leg and made some injury to my back, too.

Q. Will you indicate to the jury just what position you were thrown in, supposing you were standing between the two rails?

A. I was thrown out that way (indicating).

Q. Suppose the rails were on either side of you and you were thrown in this direction, which way was the first car thrown, and which way did the second car hit you?

A. The first car went way across the track.

Q. To the left side?

A. Yes, sir.

Q. And which way were you thrown?

A. I was thrown right in the center of the track.

Q. Right in the center of the track?

A. Yes, sir.

Q. Did you get struck by the second car, and if so, where?

A. Yes, sir; it broke my leg; broke my leg across right here (1 — above the ankle); and then it went right on top of me.

Q. In what other place were you injured?

A. I was injured in my back.

Q. In your back?

A. Yes, sir.

Q. What struck your back?

A. Something under the car that struck it.

Q. Do you know what it was?

A. Well, there is two irons setting this way in the front of the car to hold the car together; they were sticking out and they struck me first and then there was a cog wheel came up onto me, too.

24 Q. What part of your back was struck; was it near the spine?

A. It was near the center of my back.

Q. Near the center of your back?

A. Yes, sir.

Q. Which way were you facing at the time he shut the brake down?

A. I was facing ahead.

Q. You were looking forward?

A. Yes, sir.

Q. Your left foot, you say, was broken?

A. Yes, sir.
Q. How was it broken?
A. It was broken a little above the ankle.
Q. You say the wheels of the second car did it?
A. Yes, sir. They ran over it.
Q. You may exhibit that limb to the jury.

(Witness exhibits leg to the jury.)

Q. What part of the leg was broken?
A. Here; and this ankle is weak, too.
Q. Were these bones broken off right here?
A. Yes, sir.
Q. The two bones?
A. Yes, sir.

A JUROR: Do you mean the entire leg was broken or only a part of it?

Mr. GJERTSEN: I understood him to say that the two bones were broken.

Q. I understand you to say that the entire leg was broken off?
A. Yes, sir.
Q. After your injury where were you taken?
A. I was taken up to the hospital. St. Francis hospital, in Old Superior, and Dr. Connors set my leg.
Q. How long were you confined to the hospital?
A. I was confined from the 19th day of August to the 15th day of December, I think.
Q. State whether or not the injury pained you?
A. Yes, it does.
Q. Did it then; did it give you great pain and suffering?
A. Yes, sir.
Q. During the time you were confined to the hospital?
A. Yes, sir.
Q. Since leaving the hospital how has your limb been?
A. I was walking upon a cane until the latter part of April.
Q. April of this year?
A. Yes, sir.
25 Q. How has your limb been since that time?
A. It has been sore all the time.
Q. What do you mean by sore?
A. It pains me.
Q. Gives you pain?
A. Yes, sir.
Q. Tell the jury particularly with regard to the pain, where it is and everything about it.
A. I have it right there where it was broke, and in the ankle. It is in there all there time.
Q. Have you pain at the place where it was broken, and also down at the ankle?
A. Yes, sir.
Q. In what other part of the body were you injured?

A. In my back.
Q. To what extent have you suffered from that injury?
A. I can't do any hard work. I can't do any lifting.
Q. When you lift or attempt to do any hard work how does it affect you?
A. It gives me pain.
Q. Pain?
A. Yes, sir.
Q. How long from the time of the injury until you were enabled to do any kind of work?
A. I didn't commence to work until a little in June.
Q. June of this year?
A. Yes, sir.
Q. What kind of work?
A. I was doing a little sweeping and fixing round a little.
Q. Janitor work?
A. Yes, sir; but I can't keep at it all the time; I hired a man in my place once in awhile.
Q. Why can't you keep at it all the time?
A. I can't do it; my leg won't stand it.
Q. Your leg wouldn't stand it?
A. No, sir.
Q. How high wages were you getting before this injury occurred?
A. I was getting $1.50 a day.
Q. Were there anything the matter with your foot before you were injured?
A. No, sir.
Q. Was there anything the matter with your back before you was injured?
A. No, sir.
Q. Were you otherwise a healthy, strong man?
A. Yes, sir.
26 Q. What wages have you been able to earn since the injury?
A. I have been getting $1.50 a day.
Q. While you were working?
A. Yes, sir; at the time I worked; I quit the place a week ago.
Q. You had quit the place a week ago?
A. Yes, sir.
Q. I will ask you what marks, if any, were left upon your back at the time the car ran over you.
A. There is no particular mark.
Q. At that time?
A. There was a little scratch at that time, but it doesn't show much outside; it is paining me inside.
Q. How was it about your clothes?
A. My clothes were torn off me nearly.
Q. Torn off your back?
A. Yes, sir.
Q. I will ask you to state, if you know, whether or not Mr. Hol-

verson hired any one after he engaged you and the six others you referred to, at that time.

Objected to as immaterial, incompetent and irrelevant.

COURT: What is the object of that?

Mr. GJERTSEN: The entire object is to show that he continued along to hire and control the men, and that he had full authority and supervision of them, and hired and discharged the men composing this crew.

COURT: You may answer the question.

Objection overruled.

Defendant excepts.

A. Yes, sir; he did.

Q. How long after from the time he engaged you?

A. I don't know particularly.

Q. About how long?

A. I think about round two weeks, or something like that; I can't say particularly.

Q. I will ask you to state if you know who repaired the tools, or caused the tools to be repaired, that was used by that gang or crew.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled. Defendant excepts.

A. We broke a hand car once and got another one.

Q. Who did this?

A. Mr. Holverson got another car for us.

27 Q. Was there any one else of the company's agents or employés there during the time that you were on this work that gave you orders or supplied you with tools, except Mr. Holverson?

A. No.

Q. In what country were you born?

A. In Sweden.

Q. What time did you come to this country?

A. The first time I came to this country was in '81, and I was up in the British possessions three years.

Q. Are you still a subject of the King of Sweden and Norway?

A. Yes, sir; I am still a subject of him.

Q. You are not a citizen of the United States?

A. No, sir.

Cross-examined by Mr. SELMES:

Q. How old are you?

A. I am 32.

Q. What work did you do when you first came to this country, or when you first came to the British possessions?

A. I have done most everything; I work outside with a shovel and pick.

Q. Where did you work with a shovel and pick?

A. I worked at several places.

Q. When did you begin work on the railroad?

A. I worked on the railroad for the first time in '81.
Q. What were you doing on the railroad then?
A. I was shoveling in cars; in these small dump-cars.
Q. When did you work for a railroad company next? When was the next time you worked for a railroad company?
A. The next time?
Q. Yes, sir.
A. I have been everything most all the time since I came to this country.
Q. Have you been working on a section most of the time?
A. No, sir; I never worked a day on a section yet; I worked on grading and on extra gang and repairing gang; that is all.
Q. Then you were working on the track from the first time?
A. Yes, sir.
Q. When you worked on the track you were working on different places?
A. Yes, sir.
Q. You had a hand car to go back and forth to work?
A. Sometimes, and sometimes we had a train.
Q. You were working on the track?
A. Yes, sir.
Q. Sometimes you were working on a regular work train?
A. Yes, sir.
28 Q. Sometimes you were working with stationary cars?
A. Yes, sir.
Q. And when you went into the country you went to your work with a hand car?
A. Yes, sir.
Q. Going off sometimes to one place and sometimes to another?
A. Yes, sir.
Q. Did you ever work with cars where they had two hand cars at the same time before that time?
A. No, sir.
Q. You worked with the hand car when they had one hand car?
A. Yes, sir; just a small gang.
Q. Where have you worked in Wisconsin?
A. I have worked in several places; I worked at mason work on the Omaha road; I worked at Hudson, Wisconsin.
Q. Who was it that propelled the hand car; that is, worked the handles to make the hand car go?
A. The men who used it.
Q. You used to do it, did you not?
A. Yes, sir; I had to take my share at it.
Q. You took your turn at it?
A. Yes, sir.
Q. Wasn't that the way you did when you went to work for Holverson?
A. Yes, sir.
Q. Whom did you work for before you went to work for Holverson?
A. I worked on the Duluth and Winnipeg road.

Q. When did you quit work there?
A. I only worked there in July.
Q. Just before you went to work for Holverson?
A. Yes, sir; a little before.
Q. For the Northern Pacific railroad?
A. Yes, sir.
Q. Who was the roadmaster of the Northern Pacific Railroad Company at that time, at Superior?
A. I think his name was Mongavin.
Q. When did you first see him; do you know him?
A. Yes, sir; I know him by sight.
Q. Where was the first time you saw him?
A. I saw him at Old Superior.
Q. When was that?
A. It was in July last year.
Q. What did he say to you when you saw him?
A. He said he would send me up to Poplar; we asked him for work; he said he didn't have any there, but he would send us up to Poplar, and we could go to work there if we wanted to.

29 Q. He said you could go to Poplar and go on an extra crew there that Holverson was running?
A. Yes, sir.
Q. Whom did he tell that to?
A. He told that to several of us.
Q. He said that to several of you?
A. Yes, sir.
Q. And then you went up there, did you?
A. Yes, sir; right away.
Q. Did he pass you up there to go to work up there?
A. He got a pass for us.
Q. He got a pass for you?
A. Yes, sir; at Old Superior.
Q. Did he give you a letter to Holverson?
A. I don't remember about that, if he did or not.
Q. He gave you a pass and told you to go to Holverson?
A. He gave us a pass to Poplar.
Q. What did he say he would pay you?
A. He didn't say then that I heard.
Q. Did you know what you were going to get when you went to work?
A. No, sir.
Q. When you went up there you were going to get the regular wages?
A. Yes, sir.
Q. That the men were getting?
A. Yes, sir.
Q. What did you get before you went to work up there?
A. From $1.75 to $2 a day.
Q. There was $4 a week to be taken out for your board?
A. Yes, sir.
Q. What time did you get up to Poplar?

A. I can't tell exactly the time.
Q. Don't you remember the date?
A. Somewhere about the 20th to the 22d.
Q. You all went up there together; did you?
A. Yes, sir.
Q. How many men were there, when you went up there to work?
A. I don't remember how many there was of us; I think it was five or six, or something like that.
Q. Then there were five or six of you?
A. Yes, sir.
Q. Then some men came to work afterwards?
A. No; he hired one man, but he didn't go to work for him.
Q. Didn't he?
A. No, sir.
Q. He was the only man that didn't go to work; you said that all the men, together with the men who went up with you made 13?
A. All of us fellows went to work that came up there.
Q. That made 13?
A. Yes, sir.
Q. That made the whole crew, did it?
A. Yes, sir.
Q. What time used you to get out to work?
A. We got out generally at 7 o'clock.
Q. Then what did you do?
A. Sitting on platform, and then Mr. Holverson said "Come boys, put on your things."
Q. "Put on your things, and go to work?"
A. Yes, sir.
Q. That is the way it is generally done?
A. Yes, sir.
Q. Then you got on some cars; some hand cars?
A. Yes, sir.
Q. Did you generally ride on the front car?
A. I sometimes rode on the hind car, but generally I rode on the front car.
Q. There was no special car, no particular car that anybody got on?
A. No, sir.
Q. But you generally got on the front car?
A. Yes, sir.
Q. What car did Holverson go on?
A. He generally got on the front car, most generally.
Q. Did you stop the hand car at different places when you got off to work; sometimes at one place and sometimes at another?
A. Yes, sir.
Q. You didn't work all the time at the same place?
A. No, sir; sometimes we worked all day at one place and sometimes we shifted places.
Q. You would go from place to place as you had work to do?
A. Yes, sir.

Q. Did you all work together there at the same place?
A. We generally worked together.
Q. Sometimes you worked apart?
A. I believe there was a time we worked apart for an hour or so.
Q. When you worked apart who went with them? What party did Holverson go with?
A. I don't think it was but one time that that happened.
Q. What crew were you with at the time you worked apart? Were you with Holverson or were you with the other men?
A. No, sir; I was with the other crew.
Q. Who ran the hand car that day?
A. We ran it for a little distance; we were not very far apart.
31 Q. The parties ran it themselves?
A. Yes, sir.
Q. They ran it and worked it?
A. Yes, sir.
Q. Your boarding-house was at Poplar creek or Poplar river?
A. Yes, sir; that is where we boarded.
Q. That is in Wisconsin, isn't it?
A. Yes, sir.
Q. How far is it from there to where you got hurt?
A. It is about 15 miles; not quite 15 miles.
Q. Fifteen miles?
A. Yes, sir.
Q. How long had you boarded at Poplar?
A. I don't remember how long we did board there; I can't say just exactly on the day, but we moved to Old Superior some time in August.
Q. Then you moved to Old Superior before you got hurt?
A. Yes, sir.
Q. Then you were not 15 miles from where you boarded at the time you got hurt, but you were living right close to the place where you got hurt?
A. I was living right close to it then; yes, sir.
Q. Where was that? Tell me where you were living then.
A. I was living at Old Superior.
Q. What time did you go out to work that morning; that morning when you were hurt?
A. At 7 o'clock.
Q. Where did you go, east or west?
A. We went up east.
Q. From Old Superior?
A. Yes, sir.
Q. Did you go to West Superior?
A. No, sir.
Q. How far beyond Old Superior did you go?
A. I think we went about a mile from Cutter.
Q. Were you not working closer at home at that time?
A. We were a mile or so from Cutter.
Q. And about two miles from where your boarding-house was?

A. It was more than that.

Q. How far was it, did you think?

A. I think it was 23 miles or so; I can't say exactly just how many miles it was; I don't know about that.

Q. Your boarding-house, was it in Old Superior?

A. Yes, sir; right in Old Superior.

Q. Then when you started away to work that morning, did you go down there pretty fast?

A. We went at the general speed.

32 Q. Down grade you can work pretty easy?

A. Going down it is easy, oh, yes; but this was going down and up grade, too.

Q. It was down grade and up grade, too, going out to your work?

A. Yes, sir.

Q. How fast did you generally go out?

A. Sometimes we went fast, and sometimes we went slow; but most generally we went pretty fast.

Q. You have worked on a hand car very much?

A. No, sir; not very much.

Q. Did you ever see a hand car going to know how many miles an hour it was going?

A. I can judge.

Q. Did you ever know positively?

A. I can tell pretty well by the time it takes to run.

Q. Did you ever time it for a mile so that you knew exactly how fast it was going?

A. I would look at my watch when we started and seen it again when we came back again. I knew how many miles it was, and I can judge how fast it was.

Q. How quick is the very quickest you ever made a mile upon a hand car?

A. We made a mile pretty quick.

Q. How quick?

A. Well, I can't give you just an exact answer to that.

Q. Just give us your idea on it; I just want to know your idea about it, as to how fast you ever ran.

A. I don't know.

Q. How many minutes did it take you to run a mile?

A. We would run it in about four minutes or so.

Q. You would run a mile in about four minutes?

A. Yes, sir; four or five minutes.

Q. Where have you ever made a mile in five minutes upon a hand car?

A. We made it on the Eastern Minnesota.

Q. Where were you running when you made a mile in five minutes?

A. We were going from a place called Boylston down to Dedham.

Q. Was it up or down grade? What was the grade?

A. Down grade.

Q. Did you ever move a mile on an up grade?

A. No, sir; not on an up grade.
Q. This was on a down grade?
A. Yes, sir.
Q. It is pretty hard work to make a hand car go a mile in four minutes?
A. Yes, sir; four to five minutes.
33 Q. You have done it on a down grade with a good hand car and *and* men working hard?
A. Yes, sir.
Q. You say that accident happened when you were coming into Old Superior?
A. Yes, sir.
Q. Was it on a curve?
A. Yes, sir.
Q. It was on a curve?
A. Yes, sir.
Q. Upon what part of the curve?
A. Just at the end of the curve.
Q. Did you ever work a brake on a hand car?
A. Yes, sir; I have, sometimes.
Q. Did you ever see how quick you could stop a hand car?
A. No, I never tried.
Q. You don't know how quick you could stop a hand car, then?
A. I have seen it done; I have been looking at it.
Q. Do you know how quick you could stop a hand car if you tried to do it as quick as you could?
A. I have broke it a few times, but I don't know how quick, because some cars you can brake quicker than others; some cars you can put the brake on it down and some you can't; some cars have a good brake on them and some don't.
Q. With a good brake can you tell how quick you could stop a car?
A. It depends upon the speed.
Q. Doesn't it depend upon the grade whether it is up or down grade?
A. Yes, sir.
Q. Do you know how quickly you could stop a hand car if there was not much speed on?
A. I could stop it in a short time.
Q. Was that hand car on that day stopped quickly?
A. Yes, sir.
Q. Are you sure it stopped quickly?
A. Yes, sir.
Q. Did he stop that hand car within 25 feet? A distance of 25 feet?
A. No, sir; I don't think it was stopped in that distance; it might have run longer than that; I didn't notice.
Q. If he put the brake on quickly couldn't he stop it in 20 feet?
A. No, sir.
Q. Didn't he?
A. No, sir.

34 Q. He didn't?
A. No, sir.
Q. He didn't stop it in 20 feet?
A. No, sir.
Q. How long did it run before he stopped it?
A. I can't say how long is was. I don't know exactly how far it did run.
Q. Did it run 50 or 100 feet?
A. I could not say.
Q. At the time this smash-up occurred?
A. I don't know.
Q. You don't know how quickly he stopped?
A. No, sir.
Q. Was it stopped when they came together there?
A. Yes, sir.
Q. Could he stop it within 30 feet?
A. Yes, sir; most likely he could.
Q. At the speed you were going?
A. No, sir; not at that speed.
Q. How quick could he stop it going at that rate of speed? I want to find out how quick he could stop it.
A. I think it stopped within a rail and a half; that would be about 45 feet.
Q. Which way were you facing?
A. I was facing front. I was standing behind the car.
Q. You were facing front?
A. Yes, sir.
Q. Do you know when he stopped that car?
A. No, sir.
Q. Did he ever tell you why he stopped that hand car?
A. He stopped it because a woman was standing on the outside of the track.

Plaintiff's counsel objects to the last question as being immaterial and as being hearsay.

Q. What was the reason he stopped that hand car?
A. The reason I couldn't tell you; I don't know the reason.
Q. What was it you just said to me about his stopping because there was a woman on the track?
A. She was away outside of the track.
Q. Coming which way?
A. She was away outside of the track. I didn't see anything inside the rail at all.
Q. You didn't know positively why he stopped it?
A. No, sir.
Q. How did you come to say that he stopped it because there was a woman on the track?
A. He said so.
Q. What were you doing at that time?
A. When the cars came together?
35 Q. Yes.

A. I was just standing on the end of the car with the rest of them.

Q. What were you doing? Were you pumping the car, too?

A. I was holding the handle.

Q. Could he have stopped that car quicker than he did, or did he stop it as quick as he could?

A. I don't think he could stop it any quicker than he did.

Q. Did they come to a full stop before they came together there?

A. Yes, sir.

Q. How long had it been stopped when they came together there?

A. Just stopped at the same time it struck.

Q. When did you see the car behind you last?

A. I saw it down at the curve.

Q. You had just come round the curve, hadn't you?

A. Yes, sir.

Q. When you came round the curve was the hind car in sight?

A. Yes, sir.

Q. Was it in sight when you got round the curve?

A. Yes, sir.

Q. You were looking at it then?

A. Yes, sir.

Q. You looked at it clear up to the time you got hurt?

A. No, sir. I just looked at it at the time in the curve.

Q. You are sure you could see it just before they came together?

A. If I had looked behind me I could.

Q. You don't know whether it was there?

A. Yes, sir. It was there.

Q. You don't know how far you could have seen it do you?

A. No, sir. I don't know exactly.

Q. How far back could you look just before your cars came together?

A. I could look out quite aways.

Q. Could the car behind you see you perfectly plainly?

A. Yes, sir.

Q. It could? I- could see everything you were doing?

A. Yes, sir, it could. When we were coming round the curve it was about a rail and a half behind us.

Q. They could see you perfectly plainly?

A. Yes, sir.

Q. Did you know who was on the hind car?

A. Yes, sir.

Q. Who were they?

A. There was five as well as the foreman.

Q. Where are they now?

A. I couldn't tell you.

36 Q. Who was the other fellow?

A. His name was Louis Nelson.

Q. They were all working with you, were they?

A. Yes, sir.

Q. They had been working with you right along, had they not?

A. Yes, sir.

Q. Did you ever run on the hind car? I believe you said you had worked on the hind car two or three times?

A. Yes, sir.

Q. What did you do when you were on the hind car at that time?

A. I always did the same as I did on the front car.

Q. Pumped the car?

A. Yes, sir.

Q. When you were working for these other railroads and working on hand cars, used you to look out in front for trains ahead; did you do anything of that kind?

A. Yes, sir.

Q. Was it not the foreman's duty to look out for anything that might be on the track?

A. Yes, sir.

Q. It was his duty when he was on the front car to look out for anything in front of him, and to look out that a train in front didn't run into him?

A. Yes, sir.

Q. And the men on the car looked out to see that they didn't run into anything?

A. Yes, sir.

Objected to.

Q. These men on the hind car would look out for their car; that was their business?

A. I don't know what was their business.

Q. That is what you used to do when you were on it?

A. Yes, sir.

Q. You never ran into the car in front of you when you were on the hind car, did you; when you were working on the car you never ran into the car ahead of you, did you?

A. I didn't attend to the break.

Q. But the man who did attend to the brake; did he let it run into the front car, did he?

A. No; not when he could help it?

Q. Not when he could help it?

A. No, sir.

Q. That was his business, was it not?

A. That is a question I can't answer.

Q. You don't know what his duties were; you don't know what the duties of the man on the hind car were?

Witness makes no answer.

37 Q. Did Mr. Holverson ever tell you to look out for cars?

A. I don't remember any time.

Q. You don't remember whether he did or not?

A. No, sir.

Q. You don't remember what Mr. Holversen told you then with regard to running hand cars, do you?

A. Some of it.

Q. What did he tell you?

A. He told us when we were going down there—he told us to pump faster once in awhile.

Q. I mean, generally, what did he tell you; state what he told you?

A. He told us to get the hand cars and go home.

Q. What did he tell you with regard to working the hand car?

A. He didn't tell us anything.

Q. You don't remember what he told you about that?

A. No, sir.

Q. You said he told the section foreman to do something?

A. Yes, sir.

Q. How do you know he did?

A. I know it.

Q. How do you know he did?

A. I was standing right close by him.

Q. What did he say to the section foreman?

A. He said he was working a Little Canada yesterday and he didn't have time to finish it; so you had better go up in the morning and finish it, he says.

Q. What section was that; was it on that man's section?

A. Yes, sir.

Q. Who was the man?

A. His name was Bond.

Q. Holversen was working under the roadmaster, Mongavin, was he not?

Objected to.

Objection withdrawn.

A. I don't know where he got his orders from.

Q. Where did he get his tools?

A. He got them off the train.

Q. They used to send them up to him?

A. Yes, sir.

Q. You say Holversen sometimes ran the brake?

A. Most generally he did.

Q. Sometimes some one else did?

A. Most generally he did it; when he was on the car he looked to it.

Q. Did Holversen use to look out for trains—freight trains?

A. I think he did.

38 Q. When you were coming round the curve at the time you were hurt, he was looking ahead, was he not?

A. Yes, sir.

Q. He was looking ahead for trains?

A. Yes, sir.

Q. That was his duty, was it not?

A. I don't know what duties the railroad company made him do.

Q. That is what he did?
A. Yes, sir.
Q. You don't know what he had to do?
A. No.
Q. Did he run the brake on the rear car?
A. No, sir; not when he was on the front car.
Q. He didn't?
A. No, sir.
Q. He just looked out for his own car?
A. Yes, sir.
Q. He didn't have anything to do with running the rear car, did he?
A. He had charge of the whole gang.
Q. What did he have to do with running the rear car?
A. He had to look out for it when he was watching the front car.
Q. Did he say anything to the people on the rear car that day?
A. He told them to put on the hand car.
Q. What else did he tell them to do?
A. To go home.
Q. Was that all that he told them?
A. Yes, sir.
Q. Was that the last thing he told them before you were hurt?
A. I was not close up, so I can't say what the last words were exactly.
Q. You don't know exactly what the last words were?
A. No.
Q. You don't know exactly what he told them?
A. No, sir.
Q. You heard him say that, did you?
A. Yes, sir.
Q. When you came round this curve it was pretty hard pumping?
A. Yes, sir.
Q. It was on an upgrade?
A. Yes, sir; a little upgrade.
Q. There is an upgrade there?
A. Yes, sir.
Q. Where did you go after you — hurt?
A. I couldn't go then.
39 Q. Didn't you state you were sent to the St. Francis hospital, and then to the Brainard hospital?
A. They took me from St. Francis hospital the 3d day of September.
Q. Then where did you go?
A. To Brainard.
Q. How long did you stay there?
A. I stayed there on the 15th day of December.
Q. Until you were discharged?
A. Yes, sir.
Q. From further treatment?
A. Yes, sir.
Q. Did you receive any treatment for your injury to your back?

A. No, sir; I did not.
Q. Have you received any treatment for your injuries to your back since you came to Minneapolis?
A. No, sir; not since I came to Minneapolis.
Q. When did you receive any?
A. I received some treatment up at West Superior about a month ago.
Q. They did something for it when you were found hurt?
A. No, sir; they did not.
Q. That was about a month ago, I believe you said?
A. A little over a month ago I got treatment for it at West Superior.
Q. What did they do for you?
A. They put something on it.
Q. Plaster?
A. No; liniment or something of that kind; I don't know what it was.
Q. Have you been examined here by the doctors?
A. Yes, sir.
Q. Who are they?
A. I think—I don't know their names.
Q. How many doctors were there?
A. I don't know.
Q. Did you have more than one doctor examining you?
A. No; I don't think so.
Q. This crew you were working with was just the same as the regular working crew, was it not?
A. It was what they call an extra gang.
Q. An extra gang?
A. Yes, sir.
Q. You were doing the work that sectionmen did, the same kind of work?
A. Yes, sir.
Q. Simply helping the sectionmen out with work they could not do?
A. Yes, sir; of course it was.
Q. That is, sometimes they needed more work done than the regular sectionmen could do on the section?
A. Yes, sir.
Q. That is what you were doing?
A. Yes, sir; I didn't work on a section.
Q. But you were doing the same work on a section that sectionmen did?
A. Yes, sir; it was the same kind of work, but was not what we call a section.

Redirect examination by Mr. GJERTSEN:

Q. State if there was any difference between the two hand cars.
A. One was new, and the other was old.
Q. Which one were you on?

A. I was on the new one.
Q. That was the one that Mr. Holversen was on?
A. Yes, sir.
Q. Could the old one be stopped in the same space that the new one could?
A. No.
Q. Why?
A. The brake did not act as good as it did on the new one.
Q. Did Mr. Holversen know it?
A. Yes, sir.
Q. Will you state to the jury what the roadmaster said to you at the time, in Old Superior.
A. When we were going up to Poplar?
Q. Yes; before you were employed by Holversen.
A. He says, "I will send you up to Poplar."
Q. Did he tell you whom to see?
A. Yes; he told us to see Mr. Holversen.
Q. Did he state why you were to see Mr. Holversen?
A. He said: "I will send you up to Poplar to see Mr. Holversen; I think you will get some work from him," he says.
Q. That you would get some work from him?
A. Yes, sir.
Q. From Mr. Holversen?
A. Yes, sir.
Q. And upon that you went up to Poplar?
A. Yes, sir.
Q. Was there any talk about what wages you were to have until you talked to Mr. Holversen?
A. No, sir.
Q. During all this time what work you did was under his care and supervision?
A. Yes, sir.
Q. He mapped out the work for you, and gave you orders from day to day?
A. Yes, sir.

41 Court took a recess until 2 p. m., at which time the case is proceeded with as follows:

JOHN LUND, sworn on the part of the plaintiff, testifies as follows:

Examination-in-chief by Mr. GJERTSEN:

Q. Were you present on the 19th of October last, when Mr. Peterson got hurt?
A. Yes, sir.
Q. On which car were you?
A. On the front car.
Q. What time in the evening was it?
A. It was a little after 6 o'clock.
Q. How far had you traveled before you came to this place where the accident occurred?

A. I couldn't say exactly; between two and three miles.
Q. Which way were you going?
A. Going south.
Q. To what particular place, or what town?
A. Old Superior.
Q. How far was this from Old Superior?
A. It was right in Superior.
Q. How far from the heart of the city or village?

Witness makes no answer.

Q. How far from the center of the village or city was it? Do you understand me?
A. I don't understand you.

Question withdrawn.

Q. About how fast were you going?
A. Between 12 and 15 miles an hour.
Q. Was there any particular curve or point in the road at the place of the accident?
A. Yes, sir; there was a curve.
Q. About how long was the curve?
A. I couldn't say exactly; about a couple of blocks.
Q. A couple of blocks?
A. Yes, sir.
Q. How far was it from the front car where you was traveling to the other car? How far was the front car from the hind car?
A. About a rail and a half or two rail-lengths.
Q. On what portion of the front car were you standing?
A. I was standing on the front end.
Q. Which way were you facing?
A. Facing sideways.
42 Q. What were you doing?
A. I was pumping.
Q. With both hands?
A. No; with one hand.
Q. Which way was Holverson standing?
A. He was standing right at the brake.
Q. In front of you or behind you?
A. He stood at the side.
Q. On your side?
A. Yes, sir.
Q. When you were going along this curve what happened—what took place?
A. Well, Holverson stepped on the brake.
Q. Mr. Holverson turned the brake?
A. Yes, sir.
Q. Stepped on the brake?
A. Yes, sir.
Q. What kind of a brake is it? Is it one you turn with your hand, or one you step on with your foot?
A. One you step on with your foot.

Q. When you step on it with your foot it sets it in motion?
A. Yes, sir.
Q. When Mr. Holverson put the brake on what happened?
A. The car stopped, and the hind car came on and struck against the front car and throwed the front car off the track.
Q. How far did it go after he put the brake on?
A. It didn't go over 15 or 20 feet before the other car struck it.
Q. Describe how the car acted? How did the front car act when he put the brake on?
A. When he put the brake on the car was kind of shaking.
Q. How long was it from the time he put the brake on until the hind car struck you?
A. It wouldn't be over a couple of seconds.
Q. State whether Mr. Holverson gave any signal or warning to the hind car?
A. No, sir.
Q. Did he say anything?
A. No.
Q. When the hind car struck the front car what happened?
A. The hind car throwed the front car off the track.
Q. Anything more? What became of the men that were on the front car?
A. The men were throwed off.
Q. What became of Peterson?
A. Peterson fell in between the rails in some way.
Q. Peterson fell in between the rails?
A. Yes, sir; the hind car ran over him; ran over his leg.
43 Q. The hind car ran over his leg?
A. Yes, sir.
Q. Was he standing on the same side which you were?
A. No, sir.
Q. Where was he standing?
A. On the hind end.
Q. Which way was he facing, towards you?
A. Yes, sir.
Q. Going at the rate of speed 12 or 15 miles an hour, what is the usual distance it takes to stop a hand car?

Objected to on the ground that the witness is not shown to be competent to testify on this point.
Objection overruled.

A. Well, it takes about 35 to 40 feet.
Q. Thirty-five to forty feet?
A. Yes; 35 to 40 feet.
Q. Was there any difference between these two hand cars?
A. Yes, one was a new one and the other was old.
Q. How long had you worked for the Northern Pacific railroad at that time?
A. I worked a little over a month.
Q. Were you hired at the same time that Mr. Peterson was?
A. Yes, sir.

Q. You were hired by whom? Who hired you?
A. Holverson hired me.
Q. Who agreed with you upon your wages?
A. Mr. Holverson.
Q. What were you hired for?
A. One dollar and seventy-five cents a day.
Q. To do what kind of work?
A. Putting in ties.
Q. What was Mr. Halverson's position?
A. He was boss; he was foreman.
Q. How large a crew did he have? I will ask you whom he was boss for?
A. For the Northern Pacific.
Q. How large a crew did he have under his control?
A. Thirteen men.
Q. What was the nature of the work that he had under his control? What kind of work was he foreman for?
A. For surface work and putting in ties.
Q. How much road did he have to look after?
A. Well, at that time I was under him, he had three sections he went over.
Q. State whether or not he hired other men besides yourself?
A. Yes, sir.
Q. What other men?
A. I don't know their names; I seen him hire men.
Q. How many did he hire at the time he hired you, if you know?
44 A. Six of us.
Q. Six of you at a time?
A. Yes, sir.
Q. Were you then working on the same gang that Peterson, the plaintiff, worked in?
A. Yes.
Q. Who gave you orders with reference to your work?
A. Mr. Holverson.
Q. Who furnished you with tools?
A. Mr. Holversen.
Q. Was there anything else he did? Did any one else give you any directions?
A. No, sir.
Q. How were you transported? By what means were you transported to and from your work? How did you get to your work and come back home again?
A. On a hand car.
Q. State whether you used that every day?
A. Yes, sir.
Q. Who controlled the hand car?
A. Mr. Holverson.
Q. What position and on what hand car did Mr. Holverson usually occupy when you were traveling to and from the work?
A. On the head car.

Q. In what particular place on the hand car?
A. On the side by the brake.
Q. Who would give you orders to stop when you were on the hand car?
A. Mr. Holverson.
Q. What was the usual speed you traveled at going to and from your work? How fast would you travel? How fast would you make the hand cars go when you were going to and from your work?
A. Sometimes we would go faster than other, and sometimes slower.
Q. State how fast you would go at sometimes and how fast at other times?
A. We went usually about five miles an hour or so; about one mile in five minutes or so.
Q. How many miles would you travel per hour?

Witness makes no answer.

Q. Don't you understand my question?
A. No, sir.
Q. This evening you say you were going at the rate of 12 or 15 miles an hour?
A. Yes, sir.
Q. That is the evening that Petersen got hurt?
A. Yes, sir.
Q. Was that the usual rate of traveling?
A. No.
45 Q. Was this faster or slower?
A. It was faster.
Q. About how much faster?
A. About a couple of miles an hour or so.
Q. About a couple of miles an hour faster than what you usually traveled?
A. Yes, sir.
Q. State whether or not Mr. Halverson, the foreman, said anything at the time he shut down the brake on the front car?
A. No, sir; I didn't hear him say anything.
Q. He said nothing?
A. No.
Q. I will ask you if you had used that car to know what kind of car it was.
A. Yes, sir; it was the old car.
Q. Which was the front car?
A. That was the new one.
Q. Do you know whether or not there was any difference between the action of the brakes on the new car and on the old car?
A. Yes, sir.
Q. Between the brakes on the old car and the new one?
A. Yes.

Mr. SELMES:

Q. I desire to know whether this is an attempt to show any defects in the brakes of that car, because there is no allegation of the same in the complaint.

Mr. GJERTSEN: We don't propose to show it for that purpose. We propose to show that the old car could not be stopped as fast as the other one. We admit that the car was sufficient for the purpose for which it was used.

Q. Which car could be stopped the quickest?

A. The front car.

Q. What difference would there be in the distance in stopping the front car and the old car?

A. The old brake was wore out, and it wouldn't mind the brake at all.

Q. Would it take twice as long or twice as short?

A. Yes, sir.

Q. I want you to give the jury an idea about it. State what you know about it.

Mr. SELMES: We object to any testimony that the brake was worn out, because there is no such allegation in the complaint.

The COURT: He can amend his pleading and set up the fact that the brake on the old car was defective and worn out.

Q. State whether or not, of your own knowledge, Mr. Holverson knew of the condition of the old car. Did he know how the old car was?

A. Yes, sir; he knew.

46 Q. During the time that Mr. Holverson was there and you were working under him, did he do any work himself?

A. No, sir; he didn't do any work himself.

Q. What did he do?

A. He told the men what to do.

Q. He just told the men what to do?

A. Yes, sir.

Q. How long had this old car been used in your crew?

A. The car was there when I came there.

Q. It was there when you came there?

A. Yes, sir.

Q. State if you know if Mr. Holverson had used that car at any time; was he on that car at any time?

A. I don't know.

Q. What car did he usually occupy when he traveled?

A. He always went on the front car; sometimes the old car was ahead and sometimes the new car.

Q. If the old car was ahead, where would Mr. Holverson be?

A. He would be on it.

Q. On the old car?

A. Yes, sir.

Cross-examination by Mr. SELMES:

Q. How long have you been working for the company; or how long have you been working for railroads?

A. I have been working on railroads about four months.

Q. About four months before this accident?

A. Yes, sir.

Q. All the crew could see this old car, couldn't they? They had all seen it, hadn't they? The men that were working there saw this old car?

A. Yes, sir.

Q. Did you notice right off that the brake was defective on it?

A. I noticed it after the first time I was on it.

Q. Anyhow, you noticed it the first time you were on it?

A. Yes, sir.

Q. Did you ever know of anybody making complaint about it to Mr. Holverson? Did you ever say anything about it to Mr. Holverson?

A. Yes; we were kicking about the old car, because he wouldn't go and get a new one.

Q. Because it wouldn't go, or because the brake would- work?

A. Kicked about it to get a better one.

Q. Did you kick because the brake wouldn't stop the car, or because the car wouldn't run well?

A. Because the brake wouldn't work.

47 Q. When did you first kick?

A. I can't say exactly.

Q. What did Holverson say when you first kicked?

A. He said he couldn't help it.

Q. He told you you couldn't have a new one?

A. Yes, sir.

Q. Petersen had ridden on that car, hadn't he, and you had all ridden on the old car?

A. Yes, sir.

Q. When anybody rode on the old car they could see that the brakes were not good for anything?

A. Yes, sir.

Q. Could you stop the new car quickly?

A. Yes, sir.

Q. How quickly could you stop it if the men stopped pumping, and you put on the brake quickly?

A. Well, we generally stopped in about 30 or 35 feet.

Q. Could you stop it quicker than that if you tried?

A. Yes, sir.

Q. Going up grade?

A. Yes, sir.

Q. How quickly could you stop it?

A. Stop it in about 15 or 25 feet.

Q. A car that is in good condition with a good brake you can stop in 15 or 20 feet?

A. A new car.

Q. If the brakes were all right?

A. Yes, sir.

Q. If the brakes had been all right then the other car could have been stopped if the men had been looking out and the brake on it had been all right?

A. No, sir; they couldn't.

Q. Why not?

A. Because the brake didn't work the same as it ought to.

Q. If the brake had worked all right, if they were in good order and if they were not defective they could have stopped that car?

A. No; they could not stop it.

Q. Why not?

A. Because it was too close together.

Q. In how short a distance could they have stopped it if the brakes had been all right?

A. In 15 or 20 feet.

Q. You said these cars were 45 to 60 feet apart?

A. Yes, sir.

Q. There was 45 to 60 feet between them?

A. Yes, sir.

Q. Then, if the brakes on the second car had been all right they could have stopped the car, couldn't they?

A. If they told them to stop.

48 Q. Couldn't they have stopped that car within 15 or 20 feet if the brakes had been all right?

A. Yes, sir.

Q. Who was working on that car?

A. There was a fellow by the name of Nelson; I don't know all the names.

Q. Did the car come pretty fast against yours?

A. Yes, sir.

Q. Were they pumping clear up to the time they hit you?

A. Yes, sir; they pumped.

Q. You were looking at them?

A. I was looking at them sometimes, and sometimes I looked ahead.

Q. They pumped right straight up to you?

A. Yes, sir.

Q. Were any of them facing your car?

A. I don't understand.

Q. Were any of the men looking toward your car?

A. I didn't see if they were looking at us or not.

Q. When you pump on a car do not a part of the men face one way and some of them the other way?

A. Yes, sir.

Q. And that is they way they were doing on that hind car?

A. The same way.

Q. Did Holverson say anything; did he tell you to stop pumping at the time he put the brake on?

A. Yes, sir.

Q. Did that bring the car to a full stop, or did it stop it so it was running very slowly?

A. It stopped it awful fast.

Q. Did it come to a complete stop; did it stop perfectly still, or was it just running along slowly, when the other car hit you?

A. No; it was moving a little bit; it didn't have time to stop in that short distance.

Q. I want to ask you about the track; was there a curve there?

A. Yes, sir.

Q. Is there a cut there?

A. Yes, sir; there is a cut there.

Q. There is?

A. Yes, sir.

Q. Is there a little bridge on the railroad?

A. Yes, sir; there is a little bridge further ahead, when you come out of the cut.

Q. When you come out can you see the track ahead, or is it so you can only see a person standing on the track?

A. You can see a little way ahead.

Q. Before you get to this bridge can you see the track itself, or is there a small cut so that you can see up the track, or rather
49 so that you can see a person walking on the track, but you can't see the track itself?

A. You can't see over the cut.

Q. Can you see a person walking on the track, or walking near the track?

A. Yes, sir; I can.

Q. That is, you can see them before you can see the track?

A. Yes, sir.

Q. Are there any signals, bells or whistles, or anything of that kind about a hand car, so that you can notify a person that it was coming, so that a person who was on the track could be notified by the hand car, so he would keep away from them?

A. No; because you can see before you get there.

Q. You say you were employed by the company at the same time that Petersen was?

A. Yes, sir.

Q. You know Richard Mongavin?

A. Yes.

Q. He is the roadmaster up there, isn't he?

A. Yes, sir; that is what he is.

Q. Did you ever talk with him before you went to work for the company?

A. No, sir; I never talked to him.

Q. Did you see him?

A. Yes, sir; I saw him.

Q. Where did you see him?

A. I seen him at South Superior.

Q. What did he say to you?

A. He said if you want to get work——

Q. What else did he say?

A. You can go up to Poplar, up to Mr. Holversen.
Q. And he would put you to work?
A. He said——
Q. What did Mr. Mongavin do, and what did he say?
A. He gave us a pass.
Q. Did he say anything about what you were going to be paid?
A. No, sir.
Q. Did you know what you were going to be paid?
A. I didn't; I didn't ask him.
Q. Didn't you care what you were going to be paid?
A. No, sir; we didn't care about it.
Q. You were to get the regular wages?
A. Yes, sir.
Q. Did the boys tell you when you got up there what you would get, what they were getting and what you would get?
A. We talked to Holverson about it.
50 Q. What did you say to him? Did you ask him what the other boys were getting?
A. I didn't ask him myself.
Q. You never had any talk with him? You just went to work.
A. I just learnt what the other fellows were getting.
Q. Did Mongavin himself give you the pass, or did he get it of some one else? Who made it out?
A. I don't know; he didn't give the pass to me.
Q. Who took the pass?
A. Louis Nelson.
Q. Did Louis Nelson take the pass for all of you?
A. Yes.
Q. Had you been working with Louis Nelson before?
A. No, sir; I hadn't worked with him before.
Q. Did you ever work on a section where they had two hand cars before?
A. No, sir.
Q. How do you know how fast this hand car was going that day?
A. Well, I was looking at it; I know how fast they used to run before.
Q. How do you know how fast it used to run before?
A. Because I went to work and looked how it run, and it run a mile in four minutes.
Q. Was that down grade?
A. About level.
Q. This place where you got this damage was up grade, was it not?
A. When that happened?
Q. At the time you were hurt?
A. Yes; it was a little bit up grade.
Q. Which car was it that could go so fast?
A. We used to go with both cars.
Q. I thought you said the old car didn't work as well as the new car?

A. I said about the brake; it would run just as fast as the other one.

Q. Didn't you say it was not as good car to run as the new car?

A. I said the brake was not good.

Q. Who used to ride with you when you went on the back car?

A. Well, I don't know all their names.

Q. Did Holverson ever ride with you or the back car?

A. No, sir; not when I was on.

Q. When you were on the back car did you pump it right along just as you pleased?

A. We would pump it the same as the head car.

51 Q. You always tried to keep the back hand car back, so that you wouldn't run into the head car?

A. Yes, sir.

Q. That is the way you ran the back car, to keep far enough back so that you wouldn't run into the front car? Isn't that the rule? Isn't that the way that you ought to do it?

A. That is the way it ought to be done.

Q. That is the way then when there is a hand car in front of you, you must so run your hind car that it won't run into the front car, isn't that the rule?

A. I didn't see it.

Q. Isn't that the rule?

A. It is the rule.

Q. That is the rule on all sections, and what you understand as the rule, that when you are on the hind car you must look out for the front car, and not run into it, isn't that the rule?

A. I don't understand you.

Q. Isn't it the rule that when you are running on the hind car you must look out for the front car, and not run into it?

A. I suppose it is.

Q. Those were your instructions, were they not?

A. I don't know, I never was on a hand car before last summer.

Q. When you were on the hind car didn't you look out so as not to run into the front car; you were careful not to run into it?

A. Yes, sir; when I was on there.

Q. You always looked out for that?

A. Yes, sir.

Q. Did anybody tell you to look out for that?

A. There didn't ever anybody tell me to; no, sir.

Q. But you knew you ought to do it because it was the way to keep out of running into them?

A. Witness makes no answer.

Redirect examination by Mr. GJERTSEN:

Q. How far apart did these cars usually travel? Generally, how far apart were they?

A. Sometimes they were close together, and sometimes they were far apart; I couldn't say exactly.

Q. State whether or not they were running on this day as they usually ran.

A. No. This day they were closer than they used to be before, and running faster, too, than we used to go through there, too.

Q. Will you state how far up the track you could see standing on the front car?

A. They could see about six rails.

Q. Each rail about 30 feet?

A. Yes, sir.

52 Q. You mean six rails beyond the front car?

A. Yes, sir.

Q. That distance was clear up the track?

A. Yes, sir.

Q. Counsel asked you about Mongavin, what he told you; tell the jury what he told you, or said to the boys in your presence.

A. He just said; he told some of us to go down to Old Superior, and then when we went down to Old Superior he told us we could go up to Poplar, and then we would go to work for Mr. Holverson.

Q. When you came to Poplar what did Mr. Holverson say to you or say to the boys in your presence?

A. I didn't hear him say anything; I didn't talk to him at all.

Q. What was said with regard to wages?

A. Some of the boys asked him——

Objected to for the reason that the witness has just stated he didn't hear anything said to or by Holverson.

Question withdrawn.

PETER MATSON, sworn on the part of plaintiff, testifies as follows:

Examination-in-chief by Mr. GJERTSEN:

Q. You can talk English?

A. Not very much.

Q. How long have you been in this country?

A. About four years.

Q. *Where* were you working with this gang of men under Holverson last July?

A. Yes, sir.

Q. What time did you start in?

A. I don't know what day it was.

Q. What month was it in?

A. I started in the same day these fellows started in.

Q. You started in at the same time they did?

A. Yes, sir.

Q. Were you hired at the same time that they were?

A. Yes, sir.

Q. Who hired you?

A. Holverson.

Q. What work did he hire you for?

A. Work on the line of railroad.

Q. Of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. What kind of work?

A. Fix up track and put in some ties.

53 Q. How large a piece of track did Mr. Holverson have to look after?

A. He got three sections.

Q. How large was your crew or gang that you worked with; how many men were there in it?

A. There was 13, I guess.

Q. Who had charge of these men; who bossed the men?

A. Mr. Holverson.

Q. Those 13 men Mr. Holverson bossed?

A. Yes, sir.

Q. Who gave you orders to work?

A. Mr. Holverson.

Q. He told you what to do?

A. Yes, sir.

Q. Mr. Holverson did?

A. Yes, sir.

Q. How did you get to your work in the morning?

A. I don't understand that.

Q. How did you go to your work in the morning?

A. Went out on a car, on a hand car.

Q. How did you get back home at night?

A. On a hand car.

Q. How many hand cars did you have?

A. Two.

Q. What kind of cars were they?

A. Hand cars.

Q. Old or new?

A. One old and one new.

Q. Do you know how fast you could travel when you got from your work, or were going to your work, or from your work? How many miles an hour?

A. From 12 to 15.

Q. In the morning and evening when you were going back and forth, what was the common rate of speed?

A. Sometimes we would go slow, and sometimes fast.

Q. When you went fast how fast would you go?

A. Two or three miles — hour.

Q. How fast would you go when you went slow?

A. About a mile an hour.

Q. How fast would you go when you went fast?

A. About two or three miles an hour.

Q. You don't understand me. On the 19th day of August last, when Peterson got hurt, were you with the crew?

A. Yes, sir.

Q. Were you there at the time he got hurt?

A. Yes.

Q. How fast were you traveling at that time?

A. When we were going home?

Q. Yes.

A. We were going home; we were going pretty fast.

Q. How far did this car run after Mr. Holverson put the brake on at the time he stopped it; how many feet did it run after that?

A. About 15 or 20.

Q. Then it didn't run as far as cars generally go before it stopped?

A. It was shaking, you know.

Q. It was still moving when you were hit, was it not?

A. It was moving and shaking.

Q. Hadn't it gone but 15 feet after he put the brake on it before the other car ran into it; is that all it went?

A. I don't understand you.

Q. You don't understand what I mean?

A. No, sir.

Q. You say when you put the brake on a car it generally runs 45 feet before it will stop; that is what I understood you to say; is that right?

A. Yes, sir.

Q. You understand that, do you not?

A. Yes, sir.

Q. That when you put the brake on a hand car to stop it the hand car will generally run about 40 or 45 feet before it stops?

A. Yes, sir.

Q. Now, at the time Peterson got hurt there, how far did the front car go when Holverson put the brake on; how many feet did it go after *after* Holverson put the brake on?

A. About between 15 and 20 feet.

Q. Why didn't it run 45 feet?

A. Because he braked it too quick; he used the brake.

Q. Then when you brake it quickly you can stop it in 15 feet, can you?

A. Yes.

Q. Did you ever ride on that second car?

A. Sometimes.

Q. How quickly could you stop that car if you — the brake on quickly?

A. The old car?

Q. Yes.

A. It takes a longer time to stop him.

Q. About how much longer?

A. About twice as long.

Q. Then if they put the brake on quickly they could stop it in 30 feet?

A. The old one?

Q. Yes.

A. I don't understand what you mean.

Q. If you put the brake down hard on the old car how far would it run if you tried to stop it quick?

57 A. It will take twice as long a time to stop the old one.

Q. The new one they could stop in 15 feet?

A. Yes, sir.

Q. Then the old one could stop in 30 feet?

A. The brake didn't work on it; it was too old.

Q. Would it stop in 30 feet?
A. I don't know; I guess it would.
Q. Did all the men that worked there know about this old car and know the kind of brake that was on it?
A. I don't understand what you mean.
Q. Did you know what kind of brake there was on the old car?
A. Yes, sir.
Q. And the other men knew what kind of a brake there was on the old car?
A. Yes, sir.
Q. They could see it, couldn't they?
A. Yes, sir.
Q. They knew how long it would take to stop it?
A. Oh, yes.
Q. Which way were you facing?
A. I was standing with my face to the front.
Q. Did you see the hind car before it hit you?
A. Yes; I looked before that time.
Q. When did you look behind you?
A. I looked before we stopped.
Q. How long before you stopped did you look behind you?
A. What do you mean?
Q. How long before that accident occurred did you look behind?
A. I don't understand you.
Q. When did you look behind and see that car?
A. Before they struck us.
Q. Before they struck you?
A. Yes, sir; a little before.
Q. After Holverson put the brake on?
A. Yes, sir.
Q. How far away were they when you looked?
A. A rail and a half length.
Q. You don't know how far they were before, do you?

Objected to.
Question withdrawn.

Q. Were they pumping when you looked at them?
A. Yes, sir; they were all pumping.
Q. Did they keep right on pumping?
A. Well, until they told us to stop.
58 Q. Who told you to stop?
A. Until Holverson broke the car.
Q. I mean the men on the hind car. Did they keep on pumping?
A. Yes, sir.
Q. They kept on pumping right up to you?
A. Yes, sir.
Q. Did you look ahead at all?
A. Yes, sir.
Q. When did you look ahead?

A. Well, I looked ahead at the same time; sometimes I looked ahead and sometimes I looked ahead.

Q. Did you see anything on the track or near the track?

A. No, sir; I didn't see anybody on the track or near the track.

Q. Whose business is it to look and to see if there is anything on the track. Who looks out for the trains, if anybody? Do you?

A. Mr. Holverson, I guess.

Q. Then he looks out to see that you don't run over anybody? Isn't that his duty?

A. I can't understand you.

Q. Who looks out to see that a freight train doesn't run over you when you are going round a curve?

A. We would all pump and he stands and watches the brake.

Q. He stands and watches the brake?

A. Yes, sir.

Q. And looks ahead?

A. Yes, sir.

Q. He doesn't look behind?

A. He looks behind, too.

Q. Did you ever work on a section?

A. Oh, yes.

Q. Was the work you were doing at that place just the same kind of work that you did when you were working on a section?

A. Yes, sir.

Q. It was just the same?

A. Yes, sir.

SAMUEL PETERSON, recalled on his own behalf as the plaintiff, testifies:

Examined by Mr. GJERTSEN:

Q. What is the usual distance it takes to stop a hand car? I mean a hand car like the one you were traveling on the day you got hurt. Say it was traveling at the rate of from twelve to fifteen miles an hour.

Objected to as repetition.

59 A. That all depends upon how he puts the brake on; if he puts the brake on all at once he can stop it in 15 or 20 feet; but if he puts it on slowly it will stop in the usual way in about 45 feet.

Q. Forty-five feet?

A. Yes, sir; forty-five feet.

Q. I will ask you to state in what manner the brakes were put on by Holverson at the time you were injured.

A. It was put on very fast; it was put on all at once.

Q. What do you mean by all at once?

A. It was put on at once.

Q. Put down hard?

A. Yes, sir.

Q. You stated in your cross-examination in response to a ques-

tion put by counsel, how far the car traveled after Mr. Holversen put the brakes on and if I understood you correctly, you- answer was 45 feet; you may explain, if you wish, what you — by this.

A. I mean if he put the brake on in the usual way, how soon the car would stop. I said 40 or 50 feet.

Q. What is your judgment as to the distance the car did actually travel at this particular time?

A. This time?

Q. Yes; from the time he put on the brakes until you were struck?

A. About 15 or 20 feet.

Q. What difference is there in the distance that it took to stop the hind car and the one you were on, the new car, if you know?

A. It was quite a distance, because the brake did not act as good as it did on the new car.

Q. The brake on the old car didn't act as well as it did on the new car?

A. No, sir.

Q. In your judgment how much difference was there in distance?

A. I don't know exactly what the difference would be.

Q. How long had the old car been that way?

A. Ever since I came there.

Cross-examination — Mr. SELMES:

Q. Didn't you state this morning that the new car ran 45 feet after Holversen put on the brake and before you were struck?

A. Our car?

Q. Yes.

A. I am not certain if I did; I don't remember.

Q. Didn't you state that?

A. I don't remember whether I did or not.

Q. You don't remember whether you did or not?

A. No, sir.

60 Q. Didn't you state that they couldn't stop a car within a shorter distance than 40 or 45 feet?

A. If they applied the brake slowly it would take from 40 to 45 feet, about that; but if they put it on as this was done it would take 15 or 20 feet.

Q. I will ask you if you didn't state this morning that they couldn't stop it in less than 40 or 45 feet?

The COURT: He says he does not recollect about that.

Q. How long a distance could you stop the second car in?

A. I never tried to stop it all at once.

Q. How far do you think?

A. It would run quite a way before you could stop it.

Q. Can you give me an idea of how far?

A. No, sir; I can't.

Q. Did you ever try the other to see how quickly you could stop it?

A. No, sir.
Q. Did you ever see it tried?
A. I saw it tried that time when it was stopped.
Q. That was the only time you ever saw it tried?
A. Yes, sir.

Defendant's counsel now moves the court for a peremptory instruction on the plaintiff's case in favor of the defendant, on the ground that if there has been any negligence shown it is the negligence of a fellow-servant. (Citing the Wisconsin statute upon this subject.)

Defendant's counsel asks that the court order the jury to return a verdict for defendant for the following reasons:

1st. There is no negligence shown on the part of the foreman, Holverson.

2d. The negligence was clearly the negligence of the men on the hind car, and therefore the plaintiff cannot recover.

3d. Assuming there was negligence on the part of Holverson, plaintiff cannot recover, because Holverson was a fellow-servant with the plaintiff.

The COURT: I am disposed to hold this Wisconsin statute merely declaratory, and not exclusive; and I am indisposed to apply the fellow-servant rule in any case where it does not clearly apply. I shall hold that under the evidence about which there can be no contention, Holverson and this plaintiff were not fellow-servants; that is, if the jury find certain conditions to exist between these parties.

Motion denied.

Defendant excepts.

61 HENRY N. HOLVERSON sworn on the part of the defendant.

Examination-in-chief by Mr. SELMES:

Q. What is your business?
A. Working on the track.
Q. For what road?
A. Northern Pacific.
Q. How long have you been working for the Northern Pacific?
A. For the last two years.
Q. Where have you been working?
A. Superior and West Superior.
Q. What is your position?
A. Foreman.
Q. What kind of a foreman?
A. A section foreman.
Q. What were you doing in July and August, 1890?
A. Putting in ties.
Q. Where?
A. At Superior.
Q. What else were you doing there?
A. Repairing the track.

Q. Is that the work that is generally done by sectionmen?
A. Yes, sir.
Q. How large a crew did you have at that time?
A. I had 13 men.
Q. Was Samuel Petersen, the plaintiff, one of that crew at that time?
A. Yes, sir.
Q. How did he happen to go to work for you?
A. He was sent to me.
Q. By whom?
A. Mongavin.
Q. Did you make any arrangements with him with regard to his wages?
A. No.
Q. Who did?
A. I suppose it was all understood when he came there.
Q. You didn't have any conversation with him?
A. I was asked what they were paying and I told him $1.75.
Q. Did he have a note to you from Monogavin?
A. Yes, sir.
Q. How long did he work for you before the accident?
A. For close to a month.
Q. What were your duties; what did you have to do?
A. On the track, do you mean?
Q. Yes.
A. Repair the track and put in ties, and lining up the track.
62 Q. What did you do with regard to setting these men to work; what did you do with them; how did you direct them; what control did you have of them?
A. Well, they were all to work for me, and I had to put them to work.
Q. Where were your headquarters at the time of the accident?
A. Old Superior.
Q. Where had you been working that day?
A. About a mile out from the city.
Q. How did the men go to and from their work?
A. On hand cars.
Q. Would they go to different places during the day in the neighborhood of where you were working, or be taken to one place and work there; or would part or them be working on one place and part of them on another?
A. They would all be down at one place.
Q. Which hand car did you ride on?
A. Most generally on the front one; but I got sometimes on the other.
Q. What were your duties when you were riding on the front hand car?
A. Watching out ahead.
Q. What would you watch out for?
A. Trains.
Q. Anything else?

A. For anything on the track; for anything that might be on the track.

Q. Did you ever give to the men that were riding on the hind hand car any directions?

A. Yes, sir; I always told them not to run too close to the front car, but to look out for the car ahead.

Q. Was it their duty to do that?

A. Yes, sir; it was their duty to do it.

Q. To look after the car ahead?

A. Yes, sir; to look out for the car ahead.

Q. Did you regulate the speed of the hind car or have anything to do with it?

A. No, sir.

Q. Did you give them any more than general directions?

A. No, sir.

Q. What was the general direction that you gave them?

A. I told them never to come closer to the front car than five or six rail-lengths?

Q. Which car were you on that day, the hind car or the front car?

A. On the car that was in front.

Q. At the time of the accident, on the day of the accident?

A. Yes, sir.

Q. Was there any difference in the brakes of those two cars?

63 A. Not much.

Q. How quick could you stop the front car, if you tried to?

A. About 20 feet, in about 20 feet.

Q. How quick or in how short a distance could you stop the hind car, if you tried to?

A. Pretty near the same.

Q. What time did you start home that night?

A. It was after 6 o'clock.

Q. Tell the jury what you did—how you went.

A. We were on the road going home that evening after 6 o'clock; we were coming to Superior, and there is quite a big, heavy curve and a cut in it; coming round into that cut I was standing on the first car, watching ahead, because there was a lot of switch-engines in there, and I was watching ahead with my eyes on the track ahead about a couple of hundred feet; I thought I saw a head beyond and I slacked up the car; I didn't stop it; I just barely slacked it up and the other fellows on the other car ran into it and knocked this man Peterson over and run over him.

Q. You saw, you thought you saw, a head? How was that?

A. I thought I saw the head of a woman on the track ahead, or coming on the track ahead.

Q. Did you have any way to warn this woman?

A. No, sir; I didn't have any time; I seen this woman ahead of me too quick.

Q. How is the track, or how was the track in front of you where you were going? Describe how it was.

A. Well, there is a curve there.
Q. What is there beyond the curve?
A. There is a bridge.
Q. How long is that bridge?
A. About 180 feet.
Q. A kind of a trestle-work?
A. Yes, sir.
Q. Could you tell from where you were whether she was on this bridge or not? It was about 180 feet long, I understand you to say?
A. Yes, sir; about that.
Q. Well, now, could you tell whether this woman was on that bridge or not?
A. No, sir; when I first seen her I thought she was on the bridge.
Q. What kind of a grade is there there?
A. An up grade.
Q. How fast were you going at that time?
A. About seven or eight miles an hour.
Q. How fast can you make a hand car go in a place of that kind?
A. In a place of that kind?
Q. Yes.
64 A. You can't go very fast; you can't go any faster.
Q. You can't go any faster than that?
A. No, sir; not much faster, you can't.
Q. When did you give the men any instructions not to get too close to the front car?
A. I gave them that on the first start, and since too.
Q. Was that a general rule for all the men on your section?
A. Yes, sir.
Q. Did you have anything to do with the speed of the hand car?

Objected to as repetition.

Cross-examination by Mr. GJERTSEN:

Q. How long had you charge of this work?
A. About a month.
Q. A month prior to the time of this accident?
A. Yes.
Q. You had three sections that you looked after?
A. Yes, sir.
Q. That was a distance of about 15 miles, you say?
A. Yes, sir; and a little more.
Q. The sections out in the country away from Superior were about six miles apiece?
A. Yes, sir.
Q. You had 13 men under your control?
A. Yes, sir.
Q. How long had they been under your control?

A. Somewhere along about a month.
Q. About a month?
A. Yes, sir.
Q. How many men did you have before plaintiff came out?
A. Five.
Q. Where did you hire them?
A. I picked them up at Superior.
Q. What wages were you paying them?
A. One dollar and seventy-five cents.
Q. How much were you paying Peterson?
A. One dollar and seventy-five cents.
Q. All the men were getting?
A. Yes, sir.
Q. These last men that you got up at Poplar; they came out there themselves?
A. Yes, sir.
Q. You hired them at Poplar?
A. No, sir; they were sent out to me.
Q. They were sent out and you made arrangements with them at Poplar?
A. I didn't make any arrangements with them; they were sent out to me to work.
65 Q. You told them you would pay them $1.75 a day?
A. Yes, sir.
Q. Were there any other men that had any control over these men except you?
A. No, sir.
Q. They were under your exclusive control and charge as foreman?
A. Yes, sir.
Q. You received your instructions from headquarters as to what to do, and you sent the men to work to do the work?
A. Yes, sir.
Q. These men reported to you that morning, did they not; didn't each man report to you each morning for duty?
A. I don't understand what you mean.
Q. As long as they continued to work they reported to you daily; each of the men came to you and reported for work?
A. Yes, sir; I put them to work.
Q. On the hand cars?
A. Yes, sir.
Q. You took them to their work on the hand cars?
A. Yes, sir.
Q. And you took them back in the evening on the hand cars?
A. Yes, sir.
Q. Who kept the men's time?
A. I did.
Q. And on that they were paid?
A. Yes, sir.
Q. They were paid according to the time you kept?
A. Yes.

Q. When you got the men in your employ in that way, who furnished them with tools and implements to do the work?

A. The railroad company.

Q. Was that through you?

A. Yes.

Q. When you supplied them with tools, it was the company's tools that you supplied them with?

A. Yes, sir.

Q. You looked after it and supplied them with whatever tools and implements they needed in the work?

A. Yes, sir.

Q. And when a car or any tools or such things needed to be repaired they were repaired?

A. Yes, sir.

Q. They needed to be kept in repair, and it was part of your duty to look after that?

A. Yes, sir.

Q. As foreman?

A. Yes, sir.

66 Q. Your headquarters were in Old Superior at the time that this accident occurred?

A. Yes, sir.

Q. That is in Wisconsin?

A. Yes, sir.

Q. What was the usual time you made on these hand cars? How fast would you *great* usually travel on them?

A. It depends a good deal on how you pump and what kind of a track you have; when you go down grade it is easier, and you go faster, but going up grade you can't go as fast as when you are going down.

Q. I mean your average, your ordinary speed; about five or six miles an hour?

A. Somewhere along there.

Q. You think that seven or eight miles an hour is about as fast a rate of speed as you can make on a hand car?

A. Yes, sir; at that place.

Q. On the day on which this plaintiff was injured you were going at the top speed, were you?

A. Yes, sir; about seven or eight miles an hour.

Q. As fast as you could go?

A. As fast as we could go through there.

Q. Was there any particular occasion for running that fast?

A. No; I don't know that there was.

Q. You were standing upon the car near the brake, were you?

A. Yes, sir.

Q. And looking up the track?

A. Yes, sir.

Q. About how far up the track could you see?

A. About 180 feet or so.

Q. There was nothing to obstruct your view for about 180 feet up through there?

A. No, sir.

Q. How far was this bridge from where the accident occurred?

A. About 90 feet.

Q. So that you could see part of the way onto the bridge?

A. Yes, sir.

Q. Now, you say you saw a woman on the track?

A. Yes, sir.

Q. Whereabouts on the track was the woman?

A. She was coming and I couldn't tell; there is a big cut there and I couldn't see the track; I knew there was a bridge beyond, and when I saw the head of this woman coming I didn't know but she was on the bridge; I was about six or eight rail's-length from the bridge, and I couldn't see the track then.

Q. You were about six or eight rail's-lengths from the bridge?

A. Yes.

67 Q. And you thought she was probably on the bridge?

A. Yes, sir.

Q. So then you thought you had better stop the car?

A. I didn't stop it; I just slacked the car up.

Q. You didn't stop the car then?

A. No, sir.

Q. Did you give any notice of warning to that hind car to stop?

A. No, sir.

Q. You didn't holloa to them to stop?

A. No, sir; I had given them instructions to look out for us.

Q. I am not asking you about instructions; I am simply asking you to state what you did at this time in particular; how quickly did you slack up this car?

A. I just slacked up the car up.

Q. You put the brakes on?

A. Yes, sir.

Q. But in putting the brake on, how far did you travel after putting the brake on?

A. About 40 or 50 feet until we were hit.

Q. That would be, say the distance across the room here, wouldn't it?

A. Yes.

Q. You were going seven or eight miles an hour?

A. Yes, sir.

Q. How short a distance could you stop that car in if you had put the brake on as hard as you could?

A. In about 15 or 20 feet.

Q. How far was the other car behind you at the time you first put the brake on?

A. I don't know; I was not—I was not watching the other car.

Q. Did you endeavor to look?

A. I looked just as we struck the curve, and they were then about 40 feet from us; 40 to 45 feet.

Q. Then they were going about as fast as you were?

A. Yes.

Q. About the same speed?

A. Yes, sir.
Q. When you struck the curve?
A. Yes, sir.
Q. At the time you put the brake on they were about 40 or 50 feet away from you?
A. Yes, sir.
Q. Did you see the hind car before it struck you?
A. No, sir.
Q. How fast were you going when the hind car struck you?
A. We were going slow.
Q. Slow?
A. Yes, sir.
68 Q. How fast?
A. About two miles an hour.
Q. And you think the hind car was going about six miles an hour?
A. Yes, sir.
Q. You think it was about 40 or 50 feet away from you?
A. I don't know.
Q. Do you know what occurred when that car struck you?
A. It knocked the front car off.
Q. About how heavy is a hand car?
A. Some of them are heavy and some are light.
Q. About how heavy was this one?
A. Five or six hundred pounds.
Q. How many men were on it?
A. There were eight men.
Q. About how many pounds would the whole thing weight? About how much would be the total weight, or the hand car and the freight, including the men on the car?
A. About 1,300 pounds.
Q. There were not quite as many men in the hind car?
A. No.
Q. That car was not quite as heavy as the front car; there was not much freight on it?
A. No.
Q. Will you tell the jury just how far that front car was thrown when it was struck by the hind car?
A. After she got off the rails, do you mean?
Q. After it was struck what happened to it?
A. After it got off the rails it shoved us ahead about 30 feet on the ties.
Q. What did it first do? Throw it off the track?
A. Yes, sir.
Q. The first thing that was occasioned was the throwing of the front car off the track?
A. Yes, sir.
Q. And the men were thrown off the car?
A. Yes, sir.
Q. And as the result of that collision the first car was thrown about 30 feet ahead?

A. Yes, sir.

Q. What happened to the plaintiff?

A. He fell off from the car, and the car ran over him.

Q. And as the hind car struck the forward car he was left down on the track?

A. Yes, sir.

Q. And the hind car ran over him?

A. Yes, sir.

Q. You are not mistaken when you say that the car was not going any faster than six or seven miles an hour?

A. No.

69 Q. And you are not mistaken with regard to the hind car not being closer than 40 or 45 feet to the front car?

A. I don't believe it.

Q. You are not mistaken as to what distance this person was ahead of you when you say she was about six rails in front of you?

A. No; I should think so.

Q. You are sure about that?

A. Yes, sir.

Q. You are not mistaken as to the distance that you traveled after you set the brake on?

A. Oh, no; I am certain about that.

Q. It could not have been less than between 40 and 50 feet?

A. No, sir.

Q. You are sure you just simply put the brake on?

A. Yes, sir.

Q. Put it on gently?

A. Yes, sir.

Q. You are also sure you didn't give any directions to the hind car to stop?

A. No, I had no time.

Q. You didn't do it as a matter of fact?

A. No, sir, I didn't; I had no time to do it.

Q. In all these things you cannot be mistaken?

A. No, sir.

Q. Will you explain to the jury how a car coming at the rate of six or seven miles an hour, coming behind your car, that was going about two miles an hour, or otherwise traveling four miles an hour faster than you were on the car going in the same direction with you, would take this heavy car and throw it off the track. Will you explain how that could happen, that the hind car being lighter than your car, could throw your heavy car off the track, not going any faster than it did, as you say, and throw it thirty feet in front of you from the place it struck?

A. Simply because it was on a curve; it would throw a car off the track very easy on a curve; it don't take but very little to do it.

Q. You say you gave your men instructions not to run near the front car?

A. Yes, sir; I always told them to keep away from the front car.

Q. That was the instructions you gave them when they first went to work?

A. Yes, sir.

Q. Did you repeat that instruction?

A. Yes, sir; I repeated that since.

Q. How often did you repeat that?

A. Once or twice.

Q. How long before the injury?

70 A. About a week.

Q. What was the occasion of your repeating that? Why did you do it?

A. Because I would generally repeat it.

Q. Yes, but was there any particular occasion for you to repeat it at that time?

A. No, sir; only at the time we broke a hand car I told them not to come too close.

Q. You broke one hand car?

A. Yes, sir.

Q. When was that?

A. About two weeks before the accident.

Q. Did you have a collision at that time?

A. No, sir.

Q. How was that broken?

A. A wheel fell off from the car.

Q. That was not a case when two cars ran too close together?

A. No, sir.

Q. Then there was no occasion to tell them about running too close together?

A. That was why I was repeating that, in case that this should happen again.

Q. What was the distance that these two cars usually traveled apart?

A. They traveled apart sometimes 20 rods.

Q. And sometimes 30 rods apart?

A. Yes, sir—no, not 30.

Q. And how close together would they get sometimes?

A. About 30 feet.

Q. It frequently occurred that they ran 30 feet apart?

Witness makes no answer.

Q. How far have you traveled with the cars only about 40 or 50 feet apart?

A. I don't know; I was not paying much attention to the hind car; I was looking ahead of us.

Q. How far had you traveled on that day at that time about that same distance apart?

A. About a mile.

Q. You had traveled about a mile at that same distance of 40 feet apart from one another?

A. Yes, sir.

Q. You are quite sure about that?

A. Yes, sir.

Q. You didn't slack up your speed to give these men on the back car instructions that they shouldn't come so close to you, did you?

A. No.

Q. You permitted them to go on and travel in that way?

A. Yes, sir.

71 Q. You said there was some difference in the two cars in the operation of the brakes of the two cars—you had used the old car, had you?

A. Yes, sir.

Q. You were familiar with it?

A. Yes, sir.

Q. You knew how the brake of that car operated?

A. Yes, sir.

Q. And you knew how the brake operated upon the new car?

A. Yes.

Q. How long had this old car been in use?

A. We had it about two weeks.

Q. It was an old car when you got it?

A. Yes, sir.

Q. Do the brakes on an old car act as firmly as brakes on a new car?

A. If they are repaired.

Q. Were the brakes upon this car repaired?

A. Yes, sir.

Q. How recently had they been repaired prior to the time of the accident?

A. I don't know; but they were in good condition when I got it.

Q. Did you inspect them?

A. Yes, sir.

Q. You took particular notice of them, did you?

A. Yes, sir; I look as to the condition of the brake when I get a car. You can tell as to their condition when you try to stop a car.

Q. The brake will wear out on a car in a few weeks if the car is used every day, and you have to replace the old brakes by new ones quite often?

A. No, sir.

Q. You will wear out quite a number *number* of brakes upon a car?

A. They last quite a while.

Q. But you will wear out several sets of brakes upon a car?

A. Yes, sir.

Q. The first thing that wears out upon a car is the brakes, isn't it?

A. Yes, sir.

Q. How much quicker do you think you could stop the new car than you could the old one?

A. It wouldn't be much quicker.

Q. About how much?

A. About ten feet, perhaps.

Q. You mean ten feet on a rail-length?

A. Yes.

Q. That is, if it took you thirty feet to stop the old car, you could stop the new car in twenty feet—that is what you mean?

72

A. Yes, sir; that is what I mean.

Q. Didn't some of those men complain that they didn't like the brakes on the old car?

A. No, sir; never.

Q. Never made any complaint?

A. No, sir.

Q. You are still in the employ of the Northern Pacific?

A. Yes, sir; I am still in their employ.

Q. Acting as one of their foremen?

A. Yes, sir.

Q. In your old position?

A. Yes, sir; section foreman.

The COURT: What is your title? Are you section boss, or what? What is your regular title?

WITNESS: Section foreman.

The COURT: Section foreman is your title?

WITNESS: Yes, sir.

The COURT: You had jurisdiction over three sections?

WITNESS: Yes, sir; at the present time.

The COURT: And did at the time of this accident?

WITNESS: Yes, sir.

Mr. SELMES: He was doing extra work on these sections. There were three regular section foremen on those sections, and he was doing the work that those men couldn't do.

The COURT: What was your title then?

WITNESS: Foreman of an extra gang.

Q. Who discharged the men that were in your employ, if the men did unsatisfactory work?

A. I did.

Q. If the men did not obey your commands you discharged them?

A. Yes, sir.

Q. That was a rule of the employment, that if the men didn't *not* obey your commands they would be discharged?

A. Yes, sir.

Redirect examination by Mr. SELMES:

Q. Did the men on the rear car understand that the rules required them that they should look out for the hand car in front of them?

A. I think so; I told them about it.

Q. They knew of that rule, did they?

A. Yes, sir.

Q. You said, if I understand you, that at the time the hand car you had previously was broken, you called their attention to that then?

A. Yes, sir.

73 Q. Was that because it showed how easy they could be run into if the head car broke down?

A. What is that?

Q. What was the reason of your calling their attention to it?

A. In case another car ahead would break down.

Defendant rests.

After argument by respective counsel the court charges the jury as follows:

GENTLEMEN OF THE JURY: If you find that the plaintiff received a personal injury you will inquire how such injury was received. If the injury resulted from the negligent act of the defendant, unmixed with any negligence on the part of the plaintiff, then the plaintiff is entitled to recover a verdict at your hands for such damages as the parties have agreed you may assess in the event you find the other issues for the plaintiff, viz., in the sum of twenty-five hundred dollars.

But if the injury which he received was the result in whole or in part of his own negligence or resulted from the negligent act of a fellow servant or servants, your verdict must be for defendant. The other members of the extra gang of laborers working with the plaintiff were his fellow-servants, and if his injuries resulted from the negligent act of any one or more of these, he cannot recover.

The plaintiff claims his injuries resulted from the negligent act of Holverson, who was the defendant's foreman of an "extra gang of laborers," of whom the plaintiff was one, working on the defendant's road.

The defendant claims they resulted from the negligence of the plaintiff's fellow-servants, and also claims that Holverson was a fellow-servant of plaintiff. Whether he was so or not depends on the relation he sustained to the defendant company and the court instructs you that if you find from *from* the evidence that Holverson was a "foreman on extra gang" for the defendant company, and that as such foreman he had the charge and superintendency of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about 13 in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of *of* hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the au-

74 thority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman.

If you find Holverson was not a fellow-servant of the plaintiff,

but representing the company, then, as was well observed by counsel for defendant, the question under the evidence in the case for your determination is, was the injury the result of the negligent act of Holverson, the defendant's agent, who was riding on and had charge of the front hand car, or was it the negligence of the hands who were on and operating the hind car? If the negligence of the men on the hind car occasioned the accident the defendant is not liable; but if the accident resulted from the negligent act of Holverson the defendant is liable.

You have heard the evidence relating to the functions and duty of Holverson and the hands at work under him, and upon a full and fair consideration of all that evidence, you will determine whose negligent act occasioned this accident.

If you find it was occasioned by the negligent act of Holverson, then you will find for the plaintiff the agreed amount, which as I said before was $2,500. If you find for the defendant, you will simply say in your verdict we, the jury, find for the defendant.

The burden of proof is upon the plaintiff to satisfy you of his right to recover. The jury are the judges of the facts and of the credibility of the witnesses, and of the weight they will give to the testimony of each witness.

Mr. SELMES: I would ask that your honor charge the jury on the question of defective brakes.

The COURT: I don't regard that question as in this case.

Mr. SELMES: I claim that if there was a defective brake and the plaintiff knew it—knew that the brake was defective and continued to work without making any objection to the defective brake, then he assumed the risk; and if the accident was caused by that defective brake, then the plaintiff could not recover.

The COURT: It seems to me this case all turns upon the matters as to which I have charged the jury.

Mr. SELMES: I would ask that that instruction be given.

The COURT: You do not want a charge further than the issues in the case. There is nothing about the brake in the case; it all simmers down to this: If you find under my charge that Holverson was not a fellow-servant of the plaintiff, then the question is,
75 through whose negligent act did this injury occur? Was it the act of Holverson, the foreman, who was on the front car, or was it the negligent act of plaintiff's fellow-servants on the hind car? If it was the act of Holverson, then the plaintiff is entitled to the agreed amount; if it was the act of the men on the hind car, then plaintiff cannot recover, and your verdict must be for the defendant.

Defendant's Exceptions.

Defendant's counsel duly excepted to the following portion of the foregoing charge.

"Whether Holverson was a fellow-servant of the plaintiff or not depends on the relation he sustained to the defendant company; and the court instructs you that if you find from the evidence that Holverson was a 'foreman on an extra gang' for the defendant

company, and that as such foreman he had the charge and superintendance of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about 13 in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman."

Defendant's counsel requested the court to charge the jury as follows:

1. The court instructs the jury to bring in a verdict for the defendant.

The court refuses so to charge and defendant's counsel then and there duly excepted to such ruling and decision of the court, which exception was then and there allowed.

2. If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Holverson, the foreman of the extra gang, then in that case the negligence was the negligence of a fellow-servant of the plaintiff and your verdict must be for the defendant.

The court refused so to charge, and defendant's counsel then and there duly excepted to said ruling and decision of the court, which exception was then and there allowed.

76 3. If the jury believe from the evidence that the proximate and immediate cause of the accident resulting in plaintiff's injuries was the failure of the fellow-servants of plaintiff on the rear car to keep a proper lookout, or to keep the second car a sufficient distance from the first hand car, then in that case your verdict must be for defendant.

The court so refused to charge and defendant's counsel then and there duly excepted to such ruling and decision of the court, which exception was then and there allowed.

4. If the jury believe from the evidence that the rules and regulations of the company required the persons on the rear hand car to keep it at a sufficient distance from the first car to avoid a collision in case the first car was suddenly stopped, then in that case your verdict must be for the defendant.

The court refused so to charge, and defendant's counsel then and there duly excepted to such ruling and decision of the court, and said exception was then and there allowed.

5. If the jury believe from the evidence that the sole, proximate and immediate cause of the accident was the negligence of the men on the rear car, then in that case your verdict must be for the defendant.

The court refused so to charge, and defendant's counsel then and there duly excepted to such ruling and decision of the court, which exception was then and there allowed.

The third, fourth and fifth special requests of the defendant were not given because they were fully covered by the charge-in-chief and the court declined to repeat to the jury what it had already told them.

The jury retired and rendered a verdict in favor of the plaintiff and against the defendant for the sum of $2,500.

The statutes of the State of Wisconsin, to which reference was made heretofore, is as follows:

Liability for Injuries to Employés.

"Every railroad corporation doing business in the State shall be liable for damages sustained by any employé thereof within this State without *without* contributing negligence on his part, when such damage is caused by the negligence of any train-dispatcher, telegraph-operator, superintendent, yardmaster, conductor or engineer, or of any other employé who has charge or control of any stationary signal, target, point, block or switch."

77 And because the foregoing matters do not appear of record in said action, the judge who tried the said case, finding the same to be true and correct, has signed and sealed this bill of exceptions this — day of October, 1891, and ordered the same to be a part of the record.

[SEAL.] HENRY C. CALDWELL, *Judge.*

Indorsed: Ent. No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* N. P. R. R. Co., defendant. Bill of exceptions. Filed Oct. 18th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Assignments of Error.

And now comes the above-named defendant by Jno. C. Bullitt, Jr., and Tilden R. Selmes, its attorneys, and says that in the record and proceedings in the said court in the above-entitled action and also in giving judgment in said action, there is manifest error in this:

I. The court erred in charging the jury as follows:

"Whether Holverson was a fellow-servant of the plaintiff or not depends upon the relation he sustained to the defendant company; and the court instructs you that if you find from the evidence that Holverson was a 'foreman on an extra gang' for the defendant

company, and that as such foreman he had the charge and superintendance of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holvorson, and that the plaintiff was subject to the authority of Holvorson in all matters relating to his duties as a laborer, then the plaintiff and Holvreson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson acting in the course of his employment as such foreman." To the giving of which portion of the charge the defendant duly excepted.

78 II. The court also erred in refusing to charge the jury as requested by the defendant as follows:

The court instructs the jury to bring in a verdict for the defendant. To which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

III. The court also erred in refusing to instruct the jury as follows:

If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Holversen, the for-man of the extra gang, then in that case the negligence was the negligence of a fellow-servant of the plaintiff, and your verdict must be for the defendant.

To which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

IV. The court also erred in refusing to instruct the jury as requested by the defendant as follows:

If the jury believe from the evidence that the proximate and immediate cause of the accident resulting in plaintiff's injuries was the failure of the fellow-servant of plaintiff on the rear car to keep a proper lookout, or to keep the second car a sufficient distance from first hand car, then in that case your verdict must be for the defendant.

To which refusal to charge as requested, defendant's counsel then and there, before the *before the* jury retired, duly excepted, and the court then and there allowed said exception.

V. The court also erred in refusing to instruct the jury as requested by the defendant as follows:

If the jury believes from the evidence that the rules and regulations of the company required the persons on the rear hand car to keep it at a sufficient distance from the first car to avoid a collision in case the first car was suddenly stopped, then in that case your verdict must be for defendant.

To which refusal to charge as requested, defendant's counsel then

and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

VI. The court also erred in refusing to instruct the jury as requested as follows:

If the jury believe from the evidence that the sole, proximate and immediate cause of the accident was the negligence of the men on the rear car, then in that case your verdict must be for the defendant.

79 To which refusal to charge as requested, defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

VII. The court also erred in refusing to instruct the jury that if the accident was caused by a defective brake on the rear car, then the plaintiff cannot recover.

And the said defendant prays that the judgment aforesaid rendered against it in this action for the errors aforesaid and the other many and manifest errors in the said record and proceedings aforesaid, may be reversed, canceled and altogether held for nothing, and that it may be restored in all things which it has lost by occasion of said judgment.

JOHN C. BULLITT, JR., AND
TILDEN R. SELMES,
Attorneys for Defendant.

Indorsed: Ent. case No. 35. U. S. circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* Northern Pacific R. R. Co., defendant. Assignment of errors. Filed Oct. 15th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

United States Circuit Court, District of Minnesota, Fourth Division.

SAMUEL PETERSON, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the attorneys in the above-entitled action that in case an appeal on the part of the defendant a supersedeas bond executed by the St. Paul Title, Insurance and Trust Company alone as surety is a satisfactory bond to the plaintiff herein.

Dated October 21, 1891.

GJERTSEN & RAND,
Attorneys for Plaintiff.
TILDEN R. SELMES,
Defendant's Attorney.

Indorsed: Ent. case No. 35. United States circuit court, district of Minnesota, fourth division. Samuel Peterson *vs.* Northern Pacific R. R. Co., defendant. Stipulation. Filed October 18th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy. Jno. C. Bullitt, Jr., and Tilden R. Selmes, attorneys for defendant, St. Paul, Minn.

80 Know all men by these presents, that we, The Northern Pacific Railroad Company by Tilden R. Selmes, its attorney, as principal, and The Saint Paul Title, Insurance & Trust Company of Saint Paul, Minnesota, as surety, are held and firmly bound unto Samuel Peterson, in the full and just sum of five thousand dollars, to be paid to the said Samuel Peterson, his heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 10th day of October, in the year of our Lord one thousand eight hundred and ninety.

Whereas, lately at the September, 1891, term of the United States circuit court for the district of Minnesota, in a suit depending in said court between Samuel Peterson, plaintiff, and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said Northern Pacific Railroad Company and the said railroad company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel Peterson citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said railroad company shall prosecute said appeal to effect, and answer all damages and costs if said railroad company fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC R. R. CO.,
By TILDEN R. SELMES. [SEAL.]
ST. PAUL TITLE, INSURANCE AND TRUST CO.,
By MAURICE AUERBACH, *President.*
By M. L. JOHNSON, *Secretary.*

In presence of—
EDWIN IRLE.
HENRY L. DAVIS.

Indorsed: Ent. case No. 35. United States circuit court of appeals, eighth circuit. N. P. R. R. Co., plaintiff in error, *vs.* Samuel Peterson. Supercedeas bond. The within bond and surety *is* hereby approved this 14th day of October, 1891, and a writ of error is allowed in this action. Henry C. Caldwell, judge. Filed Oct. 18th, 1891. Oscar B. Hillis, clerk, by C. C. Webster, deputy.

81 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 146 pages,

numbered consecutively from 1 to 146 inclusive, is a true and complete transcript of the records, process, pleadings, orders and final judgment and all other proceedings in said cause, viz: H. W. Nickels *vs.* Northern Pacific Railroad Company, and of the whole thereof, as appears from the original record and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal of the United States Circuit Court, District of Minnesota, Fourth Division.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at St. Paul, in the district of Minnesota, this 3d day of December, A. D. 1891.

OSCAR B. HILLIS, *Clerk*,
By C. C. WEBSTER, *Deputy*.

United States circuit court, district of Minnesota, *third* division. Samuel Peterson *vs.* Northern Pacific Railroad Company. Return to United States circuit court of appeals for the eighth circuit.

82 And on the said twelfth day of December, A. D. 1891, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

The clerk will enter my appearance as counsel for The Northern Pacific Railroad Company, plaintiff in error.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES.

Endorsed: U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 52. Northern Pacific Railroad Co., plaintiff in error, *vs.* Samuel Peterson, defendant in error. Appearance. Filed Dec. 12, 1891. John D. Jordan, clerk. Jno. C. Bullitt, Jr., & Tilden R. Selmes, counsel for plaintiff in error.

And also, on said twelfth day of December, A. D. 1891, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

To the honorable clerk of said court:

Take notice that pursuant to the citation issued by the Honorable Henry C. Caldwell, judge of said circuit, on the 14th day of October, 1891, to the defendant in error, requiring him to be and appear in said court within sixty days from the date of said citation,
83 that I, the undersigned, do hereby appear for the said defendant in error as his attorney and counsellor in said cause and request this appearance to be noted upon the records of said cause, and request that said clerk will notify me of the requisite steps taken in said matter by the plaintiff in error, and that copies of the printed records of said cause and the brief of the plaintiff in error be furnished the undersigned, as provided by the rules of said court.

Respectfully,

HENRY J. GJERTSON AND
LARS M. RAND,
Attorneys for the Defendant in Error.

Dated at Minneapolis, Minnesota, November 17th, A. D. 1891.

Endorsed: U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 52. Northern Pacific R. R. Co., pl'ff in error, *vs.* Samuel Peterson, def't in error. Appearance counsel for def't in error. Henry J. Gjertsen & Lars M. Rand, Minneapolis, Minn. Filed Dec. 12, 1891. John D. Jordan, clerk.

And on the eleventh day of May, A. D. 1892, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error. } No. 52.

In error to the circuit court of the United States for the district of Minnesota.

WEDNESDAY, *May 11th*, 1891.

This cause came on to be heard, and Judge Caldwell, being
84 disqualified by reason of having sat in the trial of this case in the court below, retires, and thereupon said cause was argued by Mr. Tilden R. Selmes in behalf of plaintiff in error and Mr. Henry J. Gjertsen in behalf of defendant in error, and was submitted to Judges Sanborn, Shiras, and Thayer upon the transcript

of the record from said circuit court and the briefs of counsel filed herein.

And on the twentieth day of June, A. D. 1892, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

85 United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, *vs.* SAMUEL PETERSON, Defendant in Error.	No. 52. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Tilden R. Selmes, for plaintiff in error.
Mr. Henry J. Gjertsen and Lars M. Rand, for defendant in error.

Before Sanborn, circuit judge, and Shiras and Thayer, district judges.

The case disclosed by the record is as follows: The defendant in error, who was plaintiff in the lower court, recovered a judgment in the sum of $2,500.00 for injuries sustained while in the service of the Northern Pacific Railroad Company in consequence of being thrown from a hand car on which he was riding. At the time of the accident the plaintiff had been working for about one month as an ordinary laborer with an extra gang of track-repairers on the defendant company's road between Little Canada and Old Superior, in the State of Wisconsin. The repairs then in progress extended over three sections, or about eighteen or twenty miles of road-bed, and were in charge of a foreman by the name of Henry Holverson. The work being done consisted in putting in new ties where needed and in lining up and surfacing the track. As foreman in charge of the work Holverson had full authority, as occasion required, both to hire and discharge the men composing the extra gang of track-repairers. The force at the time of the accident, and usually, consisted of thirteen persons besides the foreman, and it appears to have worked under the exclusive supervision and control of Holverson, who supplied the men with tools and materials and directed where, when and how all work undertaken by the extra gang should be done. Besides the extra gang of track-repairers there were three other regular crews of sectionmen at work on the three sections over which Holverson's jurisdiction extended, and there is some
86 testimony in the record tending to show that the regular crews were also, to some extent, subject to Holverson's orders. The men composing the extra gang were transported each day, with their tools and equipments, to and from their place of labor by two hand cars furnished by the defendant company. Holverson always accompanied and had command of the party on these trips, and usually took a position on the front car so as to look out for obstructions ahead and to give orders when to stop.

On one of these trips, as the party were returning to Superior

from their day's labor, Holverson set the brake on the front hand car as it was rounding a sharp curve in a cut, to avoid overtaking a woman who appeared to him to be on a trestle some sixty or seventy yards ahead of the hand car. The two hand cars were running at the time at a rate of speed variously estimated at from seven to fifteen miles per hour, and were from 45 to 60 feet apart. A collision occurred almost instantaneously in consequence of the sudden stoppage of the front hand car, by which that car was thrown violently from the track and the plaintiff, who was riding thereon, was seriously injured. On the trial in the circuit court the plaintiff below contended, and the jury undoubtedly found, that the collision was due to the culpable negligence of Holverson in stopping the front *car* hand car too suddenly without giving any warning to the crew of the rear car. The defendant contended that the accident should be attributed to the fault of the crew on the rear car, in running too close to the front car in violation of Holverson's express orders; but the jury evidently discarded that view as not warranted by the evidence.

THAYER, *District Judge*, after stating the case as above, delivered the opinion of the court:

The chief question in this case, and the only one which we deem it necessary to consider, is whether on the state of facts disclosed by the record, Peterson, the plaintiff, and Holverson, the foreman, were fellow-servants? The issue concerning the alleged negligence of the crew on the rear hand car, was fairly presented by the charge of the lower court, and the jury have determined that issue adversely to the contention of the defendant company.

It may be conceded that under the rule which prevails in Wisconsin where the accident occurred, and in some other States as well, Peterson and Holverson would be regarded as fellow-servants, notwithstanding the difference in their rank; and prior to the decision in Ross *v.* Chicago, Milwaukee & St. Paul R'y Co., 112 U. S. 377, such would probably have been the conclusion reached by a majority of the Federal courts, following in that respect what seems to have been the weight of authority before that case was decided. But as the question that we have to decide in the case at bar is one of general law, which does not involve any construction or interpretation of the statutes of the State of Wisconsin, we must determine it in accordance with Federal adjudications and the principles enunciated in the Ross case, as we understand and construe it. That case has sometimes been regarded as establishing no more than what has been termed the doctrine of "departmental control." In other words, it has been contended, with great plausibility and vigor, that the case merely decides that a person is a vice-principal only when he has control of an important department of the
87 master's service, and that within the meaning of the rule a conductor of a railway train has charge of a department and is not a fellow-servant of other employés of the master engaged in operating the same train. Howard and Wife *v.* Denver & Rio Grande R'y Co., 26 Fed. Rep., 837.

But we think that it is hardly permissible to place such an arbitrary limitation upon the scope of that decision, in view of the reasoning on which the case rests, and the authorities cited in its support. Speaking for the majority of the court Mr. Justice Field uses the following language: "There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. A conductor having the entire control and management of a railway train occupies a very different position from the brakemen, the porters and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation for whose negligence it is responsible to subordinate servants." This we understand to be an explicit statement of a general rule by which to determine in any given case whether a person occupies the relation of a vice-principal or a fellow-servant. And the test applicable to the determination of that question, is not whether the person has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction and control over a work undertaken by the master, and over subordinate employés engaged in such work whose duty it is to obey, and whether he has been vested by the common master with such power of supervision and management. The other view, that the question whether a person is a vice-principal is to be determined solely by the magnitude or importance of the work that may have been committed to his charge, is open to the objection that it furnishes no practical or certain test by which to determine in a given case whether an employé has been vested with such departmental control, or has been "so lifted up in the grade and extent of his duties," as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question to decide, and that courts would differ widely in their views, if the doctrine of departmental control was adopted, is well illustrated by the case of Borgman *v.* Omaha & St. Louis R'y Co., 41 Fed. Rep. 667, 669. We are of the opinion, therefore, that the nature and character of the respective duties devolved upon and performed by persons in the same common employment, should in each instance determine whether they are or are not fellow-servants, and that such relation should not be deemed to exist between two employés where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management. The views which we have thus expressed concerning the proper interpretation of the Ross case, were substantially stated by this court in the recent case of Woods *et al. v.* Lindvall, 4 U. S. App. 49
88 and 48 Fed. Rep. 62. We believe that they are also in accord with the view generally entertained by other courts, and by

the profession, concerning the scope and effect of that decision. Shearman and Redfield on Negligence, sec. 226, 4th ed.

On the trial in the circuit court there was no substantial controversy as to the relative functions of Peterson and Holverson. It was practically conceded that Holverson's sole duty was to supervise the work of track-repairing over some eighteen or twenty miles of the defendant's road, to hire the men necessary to do that work, and to direct the operations of the force so employed. He controlled the force engaged in that work as fully and completely as any other agent or officer of the defendant company could have done. On the other hand, Peterson was an ordinary laborer, who had been employed by the foreman as a member of the extra gang of track-repairers.

At the conclusion of the testimony the trial court charged the jury with respect to the relation existing between the two employés, in the following language: "Whether Holverson was a fellow-servant of the plaintiff or not depends on the relation he sustained to the defendant company; and the court instructs you that if you find from the evidence that Holverson was a 'foreman of an extra gang' for the defendant company, and that as such foreman he had the charge and superintendence of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman."

In view of what has already been said we are unable to hold that the trial court erred in giving the foregoing instruction; we are equally unable to say that the court erred in refusing to direct the jury as a matter of law that Holverson and Peterson were in fact fellow-servants. As these are the only substantial errors assigned, the judgment of the circuit court must be and it is hereby—

Affirmed.

Filed June 20, 1892.

89 And on the twentieth day of June, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error. } No. 52.

In error to the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that said Samuel Peterson recover against the Northern Pacific Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

June 20th, 1892.

And on the fourth day of August, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals in said cause a petition for writ of error in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

90 Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United States circuit court of appeals for the eighth circuit in the above-entitled cause a manifest error hath happened, to the great damage of your petitioner, in this, that a great and manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage; all of which will more fully appear by the record of said court in said cause.

Wherefore your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States, to be directed to said United States circuit court of appeals for the eighth circuit, whereby, under the seal of said United States circuit court of appeals for the eighth circuit, the record and proceed-s aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with said writ of error, and that, the record and

proceedings aforesaid being duly inspected, the said Supreme Court of the United States will cause further to be done therein *and* correct that error what of right and according to the law and custom of the United States should be done.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES,
Attorneys for Petitioner.

And on the fourth day of August, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals in said cause a bond on writ of error in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

91 Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of the Congress of the United States of America entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved July 2, 1864, by W. S. Mellen, its general manager, as principal, and the St. Paul Title Insurance and Trust Company of St. Paul, Minnesota, as surety, are held and firmly bound unto the above-named Samuel Peterson in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Samuel Peterson, his executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and the successors and assigns of said company, jointly and severally, by these presents.

Sealed with our seals this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of the United States to the circuit court of appeals for the eighth circuit to reverse an order made by the said United States circuit court of appeals herein, directing that a mandate issue to the circut court of the United States for the district of Minnesota, which mandate directs said circuit court to enter judgment affirming the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be

92 void; otherwise the same shall be and remain in full force and virtue.

In presence of—

NORTHERN PACIFIC RAILROAD COMPANY,
By WM. S. MELLEN, *General Manager.*
ST. PAUL TITLE INSURANCE & TRUST CO.,
By ROBERT R. DUNN, *Vice-President.*
JAMES W. JONES, [SEAL.]
Assistant Secretary.

Bond approved.

DAVID J. BREWER,
Associate Justice.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this fifteenth day of July, 1892, before me appeared Robert R. Dunn and James W. Jones, to me personally known, who, being by me duly sworn, did say that he, the said Robert R. Dunn, is the vice-president and he, the said James W. Jones, is the assistant secretary of the St. Paul Title Insurance and Trust Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Robert R. Dunn and James W. Jones acknowledged said instrument to be the free act and deed of said corporation.

H. F. STEVENS,
Notary Public, Ramsey County, Minnesota.

MINNEAPOLIS, MINN., *July* 18, 1892.

Tilden R. Selmes, Esq., St. Paul, Minn.

DEAR SIR: The St. Paul Title Insurance & Trust Co. as surety on appeal bond in Peterson *vs.* N. P. R. R., on appeal to Supreme Court of the United States, is satisfactory to us.

GJERTSEN & RAND, *Att'ys.*

93 And on the fourth day of August, A. D. 1892, there was filed in the clerk's office of said circuit court of appeals in said cause, by counsel for plaintiff in error, assignment of errors in words and figures following, to wit:

United States Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

Now comes the above-named plaintiff in error, The Northern Pacific Railroad Company, by James McNaught, its attorney, and says that in the record and proceedings in the above-entitled action in

the United States circuit court of appeals for the eighth circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignments of error forming part of the record in the above-entitled action before said circuit court of appeals, to wit:

I. The court erred in charging the jury as follows: "Whether Holverson was a fellow-servant of the plaintiff or not depends upon the relation he sustained to the defendant company, and the court instructs you that if you find from the evidence that Holverson was a 'foreman on an extra gang' for the defendant company, and that as such foreman he had the charge and superintendence of putting in ties and lining and keeping in repear three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense
94 that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman;" to the giving of which portion of the charge the defendant duly excepted.

II. The court also erred in refusing to charge the jury as requested by the defendant as follows: "The court instructs the jury to bring in a verdict for the defendant;" to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

III. The court also erred in refusing to instruct the jury as follows: "If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Holverson, the foreman of the extra gang, then and in that case the negligence was the negligence of a fellow-servant of the plaintiff, and your verdict must be for the defendant;" to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

IV. The court also erred in refusing to instruct the jury as requested by the defendant as follows: "If the jury believe from the evidence that the proximate and immediate cause of the accident resulting in plaintiff's injuries was the failure of the fellow-servant of plaintiff on the rear car to keep a proper lookout or to keep the second car a proper distance from the first hand car, then in that case your verdict must be for the defendant;" to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

V. The court also erred in refusing to instruct the jury as requested by the defendant as follows: "If the jury believes from the evidence that the rules and regulations of the company required the persons on the rear hand car to keep it at a sufficient dis-
95 tance from the first car to avoid a collision in case the first car was suddenly stopped, then in that case your verdict must be for the defendant;" to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

VI. The court also erred in refusing to instruct the jury as requested as follows: "If the jury believe from the evidence that the sole, proximate, and immediate cause of the accident was the negligence of the men on the rear car, then in that case your verdict must be for the defendant;" to which refusal to charge as requested defendant's counsel then and there, before the jury retired, duly excepted, and the court then and there allowed said exception.

VII. The court also erred in refusing to instruct the jury that if the accident was caused by a defective brake on the rear car, then the plaintiff cannot recover.

Second. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Minnesota to said circuit court of appeals, erred in making its order on the twentieth day of June, 1892, affirming the judgment of the said circuit court and directing a mandate to issue to the circuit court of the United States for the district of Minnesota, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not directing a new trial of the issues raised by the pleadings in said action.

And the said Northern Pacific Railroad Company, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the district of Minnesota and the order entered herein as aforesaid by the circuit court of appeals and the
96 judgment of affirmance to be entered in said circuit court for the district of Minnesota upon said order of affirmance, for the errors aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it hath lost by occasion of said judgments and order.

JNO. C. BULLITT, JR., &
TILDEN R. SELMES,
Attorneys for Plaintiff in Error.

And on the fourth day of August, A. D. 1892, a writ of error was filed in the clerk's office of said circuit court of appeals in said

cause, the original of which is hereto attached and herewith returned:

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Samuel Peterson, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 22nd of August next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23 day of July, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk U. S. Supreme Court.

Allowed by—
DAVID J. BREWER,
Associate Justice Supreme Court.

98 *Return to Writ of Error.*

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at office, in the city of St. Louis, Missouri, this 12th day of August, A. D. 1892.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

99 [Endorsed:] 8. N. P. R. R. Co., pl'ff in error, *vs.* Samuel Peterson, def't in error. Writ of error. Filed Aug. 4, 1892. John D. Jordan, clerk.

100 And on the eleventh day of August, A. D. 1892, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

101 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
SAMUEL PETERSON, Defendant in Error.

To Samuel Peterson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on August 22nd next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23 day of July, A. D. 1892.

DAVID J. BREWER,
Associate Justice.

102 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
against
SAMUEL PETERSON, Defendant in Error.

STATE OF MINNESOTA, } ss:
County of St. Louis,

John L. Snapp, of the city of Duluth, Ramsey county, State of Minnesota, being duly sworn, says that on the 8th day of August, 1892, he served a copy of the within citation in the above-entitled action upon the defendant in error, Samuel Peterson, personally, at West Superior, Douglas county, State of Wisconsin, by delivering to said defendant in error, Samuel Peterson, a copy of the said citation and leaving the same with him; that he knew the person so served to be the person mentioned and described in said citation as the defendant in error in the above-entitled action.

JOHN L. SNAPP.

Subscribed and sworn to before me this 8th day of August, 1892.

[Notarial Seal, St. Louis County, Minn.]

CHAS. L. LEWIS,
Notary Public, Saint Louis County, Minnesota.

103 [Endorsed:] N. P. R. R. Co., pl'ff in error, *vs.* Samuel Peterson, def't in error. Citation. Due service of the within citation is hereby admitted. Aug. 1, 1892. —— ——, plaintiff, by —— ——, his attorneys. Filed Aug. 11, 1892. John D. Jordan, clerk.

104 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to 103, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Pacific Railroad Company, plaintiff in error, *vs.* Samuel Peterson, defendant in error, No. 52, October term, 1891, as the same remain upon the files and records of said United States circuit court of appeals. I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twelfth day of August, A. D. 1892.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,116. United States circuit court of appeals, eighth circuit. Term No., 153. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Samuel Peterson. Filed August 29, 1892.

Office Supreme Court, U. S.
FILED.
OCT 23 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 153.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

against

SAMUEL PETERSON,
Defendant in Error.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM J. CURTIS,
Counsel for Plaintiff in Error.

The Evening Post Job Printing House, New York.

Subscribed and sworn to before me this 8th day of August, 1892.

[Notarial Seal, St. Louis County, Minn.]

CHAS. L. LEWIS,
Notary Public, Saint Louis County, Minnesota.

103 [Endorsed:] N. P. R. R. Co., pl'ff in error, *vs.* Samuel Peterson, def't in error. Citation. Due service of the within citation is hereby admitted. Aug. 1, 1892. —— ——, plaintiff, by —— ——, his attorneys. Filed Aug. 11, 1892. John D. Jordan, clerk.

104 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to 103, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Pacific Railroad Company, plaintiff in error, *vs.* Samuel Peterson, defendant in error, No. 52, October term, 1891, as the same remain upon the files and records of said United States circuit court of appeals. I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twelfth day of August, A. D. 1892.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,116. United States circuit court of appeals, eighth circuit. Term No., 153. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Samuel Peterson. Filed August 29, 1892.

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No. 153.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

against

SAMUEL PETERSON,
Defendant in Error.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM J. CURTIS,
Counsel for Plaintiff in Error.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

SAMUEL PETERSON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This was an action brought to recover damages for injuries resulting from alleged negligence of plaintiff in error, the defendant below.

Plaintiff was employed in 1890 by the defendant as one of a gang of laborers who were occupied in repairing a part of its track near Old Superior, in Wisconsin (Record, p. 16). The gang was accustomed to go out from Superior on two handcars, returning in the same way at night (pp. 18–19). One of these handcars was new and the other somewhat older (fol. 43). It was testified for plaintiff that the older car could not be stopped as quickly as the new one; but it is conceded that it was fit for the use to which it was put (p. 42). The foreman of the gang was one Holverson (p. 56), and in going to and

coming from work he generally, though not always, rode on the front car (pp. 27, 57). Holverson had instructed the men that those on the rear car must look out for the car ahead and that the rear car must never be allowed to come closer to the front car than five or six rail lengths, *i. e.*, from one hundred and fifty to one hundred and eighty feet (p. 58). Holverson testified that either car could be stopped in about twenty feet (p. 58). Plaintiff thought that the new car could be stopped in about thirty feet (p. 31) and the old one not quite so quickly (p. 55). Lund, a witness for plaintiff, thought that the new car could be stopped in fifteen or twenty feet (p. 43). Matson, another witness for plaintiff, thought that the old car could have been stopped in thirty feet (p. 53).

On July 15, 1890, the gang of workmen, of whom plaintiff was one, was returning from work to Old Superior on these two handcars (p. 19). The new car was in front, and on it were plaintiff, Holverson and some other workmen (pp. 19-20). Holverson stood on the front of the car keeping a look out and ready to manage the brake if need were (p. 19). Plaintiff stood on the rear of the car, also looking forward (p. 21). The old car with the other workmen followed (p. 41). At a point within the city line of Old Superior the track is on an up grade toward the town, and goes around a curve through a low cut, just beyond which is a trestle (pp. 35, 45, 58). A person on the track beyond the cut can be seen over its side before the track can be seen (p. 45). As the cars rounded this curve Holverson saw a woman ahead, and, thinking she might be on the trestle, slowed down to avoid running over her, putting on the brake (p. 58), and telling the men to stop pumping (p. 44). The rear car was at this time, and had been for a mile, possibly within forty-five feet of the front car (pp. 32, 65). The men on the rear car paid no attention to the stopping or slowing of the front car, but kept on pumping, and ran into the front car, knocking it off the track and

injuring plaintiff (pp. 44, 53). It was to recover damages for the injuries thus received that the action was brought.

Plaintiff's witnesses testified that Holverson stopped his car, but differed wholly as to the space in which he did so, plaintiff saying that it ran forty-five feet before the collision (p. 31), though he afterward contradicted himself on this point (p. 55), the others putting the distance at from fifteen to twenty-five feet (p. 39, 50). Holverson himself says that he did not stop the car, but only slowed down (fol. 63). All the witnesses agree that the front car was moving when the collision occurred (pp. 45, 50–51, 63), except plaintiff (p. 31).

There is also a difference of opinion as to the speed of the cars just before the accident. Holverson puts it at six or seven miles an hour, and says that no higher speed could be attained on that grade (p. 59). Plaintiff's witnesses state the speed to have been twelve or fifteen miles an hour, but their cross-examination indicates that Holverson's estimate is probably more accurate (pp. 29–30, 50).

Defendant's counsel, at the close of the testimony and after argument, asked the Court to charge the jury, among other things, as follows:

> " 1. The Court instructs the jury to bring in a verdict for the defendant.
>
> 2. If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Holverson, the foreman of the extra gang, then in that case the negligence was the negligence of a fellow-servant of the plaintiff and your verdict must be for the defendant " (p. 70).

These instructions the Court refused and charged the jury (*inter alia*) as follows:

> " Whether Holverson was a fellow-servant of the plaintiff or not depends on the relation

he sustained to the defendant company; and the Court instructs you that if you find from the evidence that Holverson was a 'foreman on an extra gang' for the defendant company, and that as such foreman he had the charge and superintendence of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about 13 in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman" (p. 68).

To these refusals to charge and to this charge, defendant excepted.

The jury found a verdict for plaintiff in the sum of twenty five hundred dollars. The judgment entered on this verdict was, on error, affirmed by the Circuit Court of Appeals, to review the judgment of which Court defendant sued out a writ of error from this Court upon which the case now comes up.

Assignment of Errors.

The plaintiff in error specifies and specially assigns error in the Court below in its action in the following stated particulars, to wit:

FIRST.—The following errors set out in the assignment of error forming part of the record before the Circuit Court of Appeals, to wit:

I.—The Court erred in charging the jury as follows: "Whether Holverson was a fellow-servant of the plaintiff or not depends upon the relation he sustained to the defendant company, and the Court instructs you that if you find from the evidence that Holverson was a 'foreman on an extra gang' for the defendant company, and that as such foreman he had the charge and superintendence of putting in ties and lining and keeping in repair three sections of the defendant's road; that he hired the gang of hands, about thirteen in number, to do this work for the company, and had the exclusive charge and direction and management of said gang of hands in all matters connected with their employment, and was invested with authority to hire and discharge the hands to do said work at his discretion, and that plaintiff was one of the gang of hands so hired by Holverson, and that plaintiff was subject to the authority of Holverson in all matters relating to his duties as a laborer, then the plaintiff and Holverson were not fellow-servants in the sense that will preclude the plaintiff from recovering from the railroad company damages for any injury he may have sustained through the negligence of Holverson, acting in the course of his employment as such foreman."

II.—The Court also erred in refusing to charge the jury as requested by the defendant as follows: "The Court instructs the jury to bring in a verdict for the defendant."

III.—The Court also erred in refusing to instruct the jury as follows: "If the jury believe from the evidence that the accident in which plaintiff was injured was caused by the negligence of Holverson, the foreman of the extra gang, then and in that case the negligence was the negligence of a fellow-servant of the plaintiff, and your verdict must be for the defendant."

SECOND.—The Circuit Court of Appeals erred in making its order on the 20th day of June, 1892, affirming the judgment of the Circuit Court of the District of Minnesota.

THIRD.—The Circuit Court of Appeals erred in not sustaining the writ of error before it, and in not reversing the judgment entered in this action in said Circuit Court, and in not directing a new trial of the issues raised by the pleadings in this action.

POINTS.

I.

The motion to direct a verdict for defendant should have been granted without regard to the question of Holverson's status.

The Circuit Court of Appeals, in its opinion, dealt with the question of whether plaintiff and Holverson were fellow-servants, as the only question in the case. This, we submit, was an erroneous view. Wholly apart from that question, and even if it were conceded that plaintiff's position on this point was correct, still the judgment of the Circuit Court should have been reversed. Upon the evidence, which presents no very material conflict between the witnesses, there was nothing to go to the jury, for it appeared clearly (1) that plaintiff's injuries were due to his own contributory negligence; (2) that his injuries, so far as they were due to the negligence of any other person, were caused by the fault of his fellow-servants on the second car; (3) that Holverson was guilty of no negligence whatever. That this was so, is, we submit, perfectly clear. No nice points of law are involved. It is merely a question of applying well-settled principles to the facts; and the points to which we desire to call the attention of the Court are as to the facts which the record shows.

1. *Contributory negligence of plaintiff clearly appears.*

The plaintiff's position at the time of the accident, as shown by his own testimony and that of his witnesses, was as follows. He was standing at the rear of the first of two handcars (pp. 20, 31) which were proceeding along the same track at a high rate of speed (p. 21). He knew that the car behind was near, for he says that he had looked back and had seen it

just before the accident (p. 32). He also believed that the brake on that car was not a very efficient one, and that it could not be stopped in a very short distance (p. 37). Suddenly the car on which he was riding was (according to his testimony) violently stopped (p. 54). He was looking ahead at the time, and, though perfectly aware of the nearness of the other car, its speed, and the difficulty of stopping it, he did not even look around (pp. 21, 32). It is evident that he could have gotten off safely, had he seen that the collision was imminent, for the car on which he was had nearly stopped when it was struck by the car behind it.

The rule as to contributory negligence has been recently stated by this Court in these words:

> " Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured."
>
> *Grand Trunk Railway Co.* v. *Ives*, 144 *U. S.*, 408.

Applying this rule to the present case it is plain that plaintiff cannot recover. To whomsoever the negligence which caused the collision is to be imputed, yet no harm would have resulted to plaintiff, but for his absolute want of the most ordinary care. Had he but glanced behind him, he would have been safe, yet he did not so much as turn his head, though he knew that unless the car behind were stopped at once a collision was inevitable, and that, (according to his own account and that of his witnesses), even if every effort were made to stop it, a collision was exceedingly probable, to say the least. Had he looked he would have seen that no effort was made to stop it, but that it continued on its way with undiminished speed until it struck the car in front. Such absolute folly and recklessness are almost incredible and could hardly be believed pos-

sible but that they rest upon plaintiff's own testimony; and that, but for them, the accident to him could not have happened. Plaintiff was doing nothing on the front car, and was thus at liberty to look out for himself; he was in the situation which exposed him most to danger from the second car; he knew the risk and had recently noted how near the car behind was to him; and yet he stood staring stupidly forward until the injury, which any reasonable man must have foreseen as probable, and against which he would have guarded, had occurred. Whatever the proximate cause of the *collision* may have been, the proximate cause of *plaintiff's injury* was solely his own want of the most ordinary care and prudence, and for an injury due to such a cause he cannot recover.

2. *The collision was due solely to negligence of plaintiff's fellow-servants on the second car.*

If we disregard the contributory negligence of plaintiff, evident as that is, and consider only the cause of the collision, it is not less plain that plaintiff has still shown no cause of action.

The proximate cause of the collision was the negligence of the men in charge of the second car. In several ways their negligence plainly appears, and, since the collision was caused by their running the second car against the first car, it was to their conduct that the accident was due.

In the first place, Holverson testifies that he told the men that the second car must be kept at a distance of from one hundred and fifty to one hundred and eighty feet behind the first car (p. 58). Plaintiff's witnesses are vague on this point, but, at any rate, they say that they knew that the second car must keep at a safe distance from the first, and must avoid running into it (pp. 33, 47, 67). Such knowledge requires no special instructions. That duty is obvious. But in fact the second car was, according to the undisputed testimony, running

within forty or forty-five feet of the first car. This, of itself was negligence, and may well have contributed to the accident.

In the second place, the men failed to stop the second car when the first car stopped or slackened. It is not material within what distance that car could be stopped. Holverson says within twenty feet (p. 58). Plaintiff's witness says in thirty feet (pp. 52–53). But whether within twenty or thirty feet, it is evident that, had the men in charge of that car acted promptly, they could have stopped it before it reached the car ahead, for the distance between them was not less than forty feet at the least. Even if we assume a state of affairs more favorable to the theory that the collision was inevitable, when once the first car was stopped, than is any testimony given on either side, and suppose that the second car could not have been stopped before it struck the car on which plaintiff was, it is plain that, at worst, its speed could have been so much diminished that the shock of its striking would have been too slight to do any harm. Thus the negligence of the men on this second car was, in this way, the proximate cause of the collision.

In the third place, not only did the men on the second car not try to stop it, but they continued pumping it until the very moment of the collision (pp. 44, 53), thus, in the most reckless way, doing all they could to aggravate the consequences of their negligence in other respects. In view of the fact that they were going up a grade, and on a curve, it is probable that, had they merely ceased pumping, no great harm would have been done by the collision. But they kept their car moving at the highest speed possible to them, and by this utterly inexcusable and reckless negligence were the authors of plaintiff's misfortune.

Now every man upon the second car was, in the strictest sense, a fellow-servant with the plaintiff. Holverson, the foreman, was the only member of the party as to whose status the least question has

been raised, and Holverson was on the first car. Every other man on these cars was, like plaintiff, a laborer working on the track, in the same gang with him. For any injuries which he received which were due to the negligence of these fellow-servants, plaintiff can maintain no action against defendant, and if the negligence of anybody but himself was the cause of his injuries, it was the negligence of these men. There is no conflict of evidence on this point. There was no question for the jury. The culpable and reckless negligence of the men on the second car caused the accident, and these men were plaintiff's fellow-servants.

Upon this ground alone a verdict for defendant should have been directed.

(3.) *Holverson was guilty of no negligence.*

Assuming now, what we strenuously deny, that Holverson represented the defendant in such way as to make it liable to plaintiff for injuries caused by Holverson's negligence, plaintiff's case is no better. This assumption is the foundation of plaintiff's claim, but, if it be granted, he has still failed to show a cause of action, for he has shown no negligence of Holverson.

At the time of the accident Holverson was riding on the front of the first car, and was managing the brake (p. 19). He was keeping a lookout for obstructions or dangers ahead. Sometimes he had ridden on the first car and sometimes on the second car (p. 57), but whoever rode on the front of the first car must evidently keep a lookout ahead, and it would clearly have been grossly negligent to omit such lookout. It is equally clear that whoever was keeping such lookout could pay no attention to what was passing behind him. It was, moreover, a proper place for the foreman of the gang.

The car was passing around a curve through a low cut, approaching a trestle, and the lay of the

land was such that a person on the track ahead could be seen over the side of the cut from the car before the track where the person was could be seen (p. 45). Holverson saw a woman ahead, and thinking she might be on the trestle put on the brake (p. 58). The car slackened its speed and had nearly stopped when the car behind, which maintained its previous speed, struck it (p. 20) and overturned it, causing the injuries of which plaintiff complains.

In all this there is not the slightest proof of negligence on Holverson's part. On the contrary, he acted only as a prudent man should. Placed where he was, it was his business to see that the car ran into no one ahead, and when he saw a person in front in a position which might be one of great peril, but as to which he could not be sure until proceeding a little further, he would have been grossly negligent had he not slackened speed until he could ascertain that it was safe to proceed. Had the woman actually been on the trestle, and had Holverson kept on at full speed and so run her down, no one can doubt that he would have been negligent. To slacken speed, therefore, was not only proper and prudent, but the only proper and prudent course for him to pursue.

This is the only act of Holverson's which could or did in any way contribute to the accident. Even so it was not the proximate cause; but not even remotely is he in any other way connected with what happened, by any act of his. Nor was there any negligent omission on his part. He did not, indeed, look behind, or give any orders to the men on the second car, but it was not his duty to do so. His business was to look in front, and see that the track was clear. He would have been negligent had he omitted this duty. Nor was there any reason why he should look behind. He could not have anticipated that the men on the second car would be so inconceivably and recklessly negligent as to run into the car ahead, nor was he bound to anticipate

it. They had been warned to look out for the car in front, to keep at a safe distance, and not to run into it. He was not bound to anticipate, nor was he negligent in not anticipating, that they would wholly disregard this warning.

The Circuit Court of Appeals suggested that the jury might have found him negligent in stopping his car too suddenly, but there are no facts to warrant such an inference, even if the fact were found to be that he stopped suddenly. It may well have been prudent and proper under the circumstances to stop at once, and in any case there could be no negligence in so doing, for there was no reasonable ground for apprehending any accident from such stopping, and, in fact, none could have happened but for the recklessness of the men on the other car.

We submit, therefore, that on the undisputed testimony and granting all that plaintiff claimed as to the liability of the defendant for the acts of Holverson, there was no view of the evidence which could support a verdict for plaintiff, and it was error to allow the case to go to the jury—error so plain and palpable that it is difficult to understand how it could have occurred. Where the evidence shows absolutely no negligence of defendant or of any one representing it, and does show affirmatively that plaintiff's injuries were due to his own disregard of the most ordinary precautions, and, as a next cause, to the gross negligence of men who were beyond dispute his fellow-servants, it is the duty of the Court to take the case from the jury, and not to permit them to render a verdict which cannot stand in law upon any possible interpretation of the facts.

In

Metropolitan Railway Co. v. *Jackson*,
3 *App. Ca.*, 193,

Lord Cairns said:

> "The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any

facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury, upon the ground that, in his opinion, negligence ought not to be inferred, and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

It is to the total disregard of these well-settled principles by the Circuit Court that the verdict and judgment in this case are due. Had that Court observed them it would not have committed the error of denying the motion to direct a verdict for the defendant, and this Court would not now be called upon to reverse its erroneous ruling.

II.

Holverson was a fellow-servant of plaintiff.

The whole case of plaintiff rests upon the position that Holverson was not a fellow servant of plaintiff. It is upon his alleged negligence that plaintiff relied to establish his cause of action, and if such negligence would not make defendant liable, it is sub-

stantially conceded—indeed, it cannot be disputed—that plaintiff could not recover. In the opinion of the Circuit Court of Appeals no other question was discussed, and the Circuit Judge who presided at the trial refused a request to charge that plaintiff and Holverson were fellow-servants. Even if, then, we concede that Holverson was negligent, or that from the evidence as to his conduct the jury might infer negligence, still plaintiff cannot succeed unless he has also shown that Holverson occupied such a position that he was really a "vice principal," standing in the place of and representing defendant, and not a fellow-servant of plaintiff. That position cannot be maintained. Plaintiff and Holverson were fellow-servants of defendant, and therefore if, as plaintiff asserts, his injuries were due to Holverson's negligence, no action will lie against defendant on account of them.

The opinion of the Circuit Court of Appeals was based wholly upon the decision of this Court in *Chicago, Milwaukee, &c., R. R. Co.* v. *Ross*, 112 *U. S.*, 377, and proceeds upon a misapprehension of the doctrine of that case. In the later decision in *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 *U. S.*, 368, this Court has expounded the *Ross* case, as it is commonly called, and has clearly expressed the true limitation of the doctrine upon the subject of fellow-servants laid down in that decision, in a manner which is quite conclusive of the case at bar, and which renders any extended discussion of the question here unnecessary.

In the *Ross* case, the Court held, that, as a corporation must act through officers and agents, the acts of those of its agents who are in charge of separate departments are, as to other employees, acts of the corporation itself and not of fellow-servants, and hence negligence of such agents may give ground for an action by another employee who is injured thereby. This rule was there applied to the conductor of a train, who, by the company's regulations, had entire change of the running of it; and the engi-

neer of the train, who was injured by the conductor's negligence, was held to have an action against the company which was their common employer.

In the *Baugh* case, the Court held that this rule only applied to the heads of considerable departments, and not to every employee who was put in command of one or more of his fellow-laborers. It held, moreover, that it did not cover all acts of negligence, but only such as related to matters with regard to which the common employer owed a duty of care to its servants, *e. g.*, in the furnishing of proper tools and appliances and reasonably competent fellow-servants. Beyond these points, since the employer could not become liable, as an employer, for any negligence, the negligent acts of its employees could not make it liable. It applied this rule to the case of an engineer who negligently ran his engine so that his fireman was injured. The engineer and fireman were held to be fellow-servants, though the latter was subordinate to the former; and, since the injury to the fireman did not result from obedience to the orders of the engineer, nor from defective appliances or the lack of skill of the engineer, the company was not responsible. Speaking of the *Ross* case, the Court said:

> "The Court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability."

And also

> "The truth is, the various employees of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, and only those on the same step fellow-servants, because not subject to any control by one over the other."

And also:

> "It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any orders of his superior officer. It did not result from the mere matter of control. It was through negligence on the part of the engineer in running his engine, and the injury would have been the same if the fireman had had nothing to do on the locomotive, and had not been under the engineer's control. In other words, an employee carelessly manages an engine and another employee who happens to be near enough is injured by such carelessness. It would seem, therefore, to be the ordinary case of the injury of one employee through the negligence of another."

In *Northern Pacific R. R. Co.* v. *Hambly*, 154 *U. S.*, 349, the *Baugh* case was expressly approved, and the Court said:

> "* * * to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow-service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seaman of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as,

> for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."

The Courts below fell into all the errors, concerning the effect of the *Ross* case, which this Court in these decisions condemned. Tried by the tests laid down in the *Baugh* case, there can be no question that the doctrine of "vice-principals" does not apply to the case at bar.

In the first place, Holverson was merely a foremen at the head of a temporary gang intended to supplement the regular section gangs on the railroad. His position was not permanent, nor a part of the regular organization of the railroad. In the established order of the officials of the railroad he had no place.

In the second place, he was merely directing the operations of a gang of thirteen men employed in repairing the track. It is an almost ludicrous perversion of the law as laid down in the *Ross* case to hold one in such a position to be the head of a "department." This is exactly the error condemned in the *Baugh* case.

If we consider the nature of the negligence of which Halverson was accused, it is equally apparent that under the decision in the *Baugh* case no liability of defendant could arise from it, whatever Halverson's position. In that case the Court said:

> "The question turns rather on the character of the act than on the relations of the employees to each other. If the act is done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive

> duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

In the case at bar there was no question of failure of the master to perform every positive duty. It was expressly conceded that the cars were fit for the purpose for which they were used. No question was made that Holverson and the other workmen were competent and fit persons for their respective positions. No negligence, then, in the performance of any duty which the master owed to plaintiff as his servant is charged, and therefore no liability of the master was established. That Holverson was negligent in too suddenly stopping the car, if such were the case, would not even tend to prove a liability of defendant.

Furthermore, there appears in the case at bar another element which was also in the *Baugh* case, and to which the Court in that case particularly adverted. This is, that admitting Holverson to have been plaintiff's superior, and in matters affected by that relation a vice-principal and not a fellow-servant, yet this did not in the least have to do with plaintiff's injuries. It was not because plaintiff obeyed any orders of Holverson, nor because of any control of Holverson over him that he was injured. In the matter of running these cars all were fellow-servants together, whatever their relations might be when other work was concerned. Sometimes Holverson rode on the first car, sometimes on the second, and it was the mere accident, so to speak, of his riding on the first car on the occasion of this mishap which put it in his power to control the movements of the first car. Obviously some one must keep a lookout on the first car and control its brake. Obviously when Holverson rode on the second car this duty must be performed by one of the other laborers. Thus it formed no part of Holverson's duties as foreman, and the fact that he was foreman has no more bearing upon the question of

defendant's liability for his negligence in the management of this car than would the fact that he was a church member or belonged to the enrolled militia. Thus the case is stronger than the *Baugh* case. In that case the engineer was at least acting in the performance of duties specially confided to him by the company; in this case Holverson was managing the car, not because it was a part of his special duties to do so, but because he chanced to be on the front of that car. Thus it is peculiarly, as was said by the Court in the *Baugh* case, "the ordinary case of the injury of one employee through the negligence of another."

We submit, therefore, that plaintiff's injury was, even upon his own theory, the result of the negligence of a fellow-servant, and hence the defendant was in no way liable. Upon this ground alone, therefore, the Circuit Court erred in refusing to direct the jury to find a verdict for defendant. It also erred in refusing to charge the jury that plaintiff and Holverson were fellow-servants; and in affirming the judgment rendered for plaintiff the Circuit Court of Appeals likewise erred.

III.

The judgment below should be reversed, with costs.

WILLIAM J. CURTIS,
Of Counsel for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 153.

NORTHERN PACIFIC RAILROAD COMPANY,
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Brief for Plaintiff in Error.

The brief of Mr. Curtis for plaintiff in error contains a full and adequate discussion of all the questions in the record. I purpose briefly to call more particular attention of the court to the fundamental legal proposition on which the decisions of the Circuit Court of Appeals and of the Circuit Court at the trial were based. Those decisions were that one Holvorson, a foreman of a gang of section-men was the vice-principal (or might be found by the jury to have been such) of the plaintiff in error and not a co-servant of Peterson.

The facts relevant to this question are very brief. The Railroad Company found it necessary on a portion of its road in Wisconsin to do more

track repairing than could be accomplished by the ordinary section crews. For this purpose it employed an "extra gang" of men, thirteen in number, to do extra track repairing over 18 to 20 miles of road comprising three ordinary sections. The nature of the work which they did was the same as that done by the regular section crews. The foreman of this "extra gang" was Holvorson, who had authority to hire and discharge men and direct where they should work; their work was confined to the putting in of cross-ties and lining and leveling up the track. The defendant in error was one of this crew of men. Holvorson had exactly the usual powers of a section boss or section foreman. The extra gang rode to and from their work on hand cars which the company furnished for that purpose. These cars were pumped by the laborers themselves who rode on them. Holvorson sometimes rode on one car and sometimes on the other. The cars were checked in speed or stopped by a brake worked with the foot. It was the duty of all the men riding on them to look out for trains and other obstructions on the track and generally to take care of themselves. On the day of the accident Holvorson was riding on the front car. He applied the brake, checking the speed of the car, when the rear car came up and collided with the first, injuring Peterson, the defendant in error. The jury has found that the cause of the injury was the negligent checking of the speed by Holvorson. Assuming for the purpose of the argument, but not conceding, that this

finding was based on sufficient evidence, the question of law is whether Holvorson was a vice-principal representing the Railroad Company, his negligence being its negligence, or whether he was a fellow workman with the defendant in error.

It is clear that the negligence found by the jury did not consist in a breach of, or grow out of any of those affirmative duties which the master owes to a servant; it was not the result of defective appliances, unsafe tools, track or cars, or of the failure to select competent and careful fellow workmen. On the contrary the setting of the brake on the front car which caused the injury was one of those things which it was the duty of the workmen to do themselves; a thing which might as well have been done by any other of the workmen as by Holvorson. He did it in the performance of his duties as a servant, or workman, or laborer and not in the exercise of any function as foreman, or in which he represented the Railroad Company, or with respect to which the Railroad Company owed any affirmative duty to the laborers.

The case was decided by the learned Circuit Court of Appeals under a clear misapprehension of the decision of this court in the case of *Chicago Milwaukee & St. Paul Railway Company* v. *Ross* 112 U. S. 377. This court has since the decision in the court below which is here under review, in the case of *Baltimore & Ohio Railroad Company* v. *Baugh*, 149 U. S. 368, and *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349, established the proposition well stated by Justice

Brewer in the *Baugh* case; "Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty then there should be some personal wrong on the part of the employer before he is held liable therefor." This rule is conformable to the decisions in Massachusetts and New York, to those in Wisconsin where the cause of action arose, to those in Minnesota where the action was brought and to the great weight of authority.

Since the decision here under review the Circuit Court of Appeals in the Eighth Circuit has completely changed its rule of decision, so that it does not now admit of doubt that that court would under its present rulings hold Holvorson a co-servant with respect to the negligence complained of. In the case of *What Cheer Coal Company* v. *Johnson*, 56 Fed. Rep. 810, the plaintiff was injured by the falling of a portion of the roof in the mine of the What Cheer Coal Company. He was working under a foreman who had authority to direct some ten or twelve men in their labor, and whose duty it was to prop up the roofs of the mine with timber; to sound and inspect them and to keep them safe; to drill holes, charge them with powder, fire blasts and knock down the coal. It was the duty of the plaintiff and his companions to shovel out

the coal under the directions of the foreman. The Circuit Court of Appeals in the opinion by Sanborn, Circuit Judge, held that the foreman and laborers in that case were all common servants of one master, that their work was homogeneous, consisting in the one business of removing coals from the earth. When the case at bar was decided in the court below that court held an erroneous view of the force and effect of the *Ross* case, and its course of decision has wholly changed since the decision of this court in the *Baugh* case. See *City of Minneapolis* v. *Lundin*, 58 Fed. Rep. 525; *St. Louis Iron Mountain & S. R. R. Co.* v. *Needham*, 63 Fed. Rep. 107; *Kansas & A. V. Co.* v. *Waters*, 70 Fed. Rep. 28.

No possible distinction can be pointed out between the position of Holvorson and the position of a section foreman. It approaches absurdity to say that each section foreman having charge of a few men engaged on the track repairs of six miles of railroad is the head of a distinct department of the work of a railroad company; that he controls such department and is so far the *alter ego* of the master, that his negligence is the master's negligence.

It is moreover anomalous and absurd that an injury not constituting a cause of action according to the law of the state where it occurred, or according to the law of the state where the action is brought may be changed into a cause of action in the federal court. The decisions in the courts

of Wisconsin and Minnesota abundantly cover the question and show that the plaintiff's injury was not actionable in the courts of either state. *Hoth* v. *Peters* 55 Wis. 405; *Heine* v. *Chicago & Northwestern Ry. Co.*, 58 Wis. 525; *Lindvall* v. *Woods*, 41 Minn. 212; *Olson* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 38 Minn. 117.

C. W. BUNN,
Of Counsel for Plaintiff in Error.

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DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

MR. HENRY J. GJERTSEN,
Attorney for the Defendant in Error.

T. McDERMOTT PUB. CO., MINNEAPOLIS.

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Not knowing what will be the nature of appellant's statement of the case, and assuming that he will present substantially the same statement as was used by the plaintiff in error in the circuit court of appeals, I feel called upon to present a statement of the case in behalf of the defendant in error.

Statement of the Case.

On the 19th day of August, 1890, the plaintiff in error was engaged in repairing three sections of its road, running out from West Superior, in the State of Wisconsin. This work had been in progress something over a month prior to this date. Plaintiff in error had placed one Henry Halvorsen in the exclusive charge of this work. He bore the title of "foreman of an extra gang". Mr. Halvorsen, as foreman of the extra gang, had the charge and superintendency of putting in ties and lining, and of all the work in keeping in repair these three sections of defendant's road, a distance of about eighteen or twenty miles. *Mr. Halvorsen, as such foreman, had charge, not only of the men under his immediate control, but also of the section crews working upon each of the three sections.* (See transcript of record, pages 17, 34 and 67). Halvorsen, as such foreman, had exclusive charge and superintendency of this particular department of defendant's work.

Halvorsen, as the representative of the defendant company, hired the crew of hands under his control, employed upon the work, and fixed their rate of compensation. *He had exclusive charge and management of this gang of hands, in all matters connected with their employment.* He was invested, by the company, with full authority to *hire and discharge* these hands in his employ, at his discretion. (Pages 16, 17, 18, 60 and 61, record.)

Halvorsen did no manual labor in his department. Page 42.) His duties were exclusively those of management and control. *He not only hired the men but fixed their rate of compensation, kept their time on which they were paid,* directed what work should be done, and where it should be done. He furnished the tools and impliments used in the work, and saw that they were kept in repair.

About a month previous to the day of the injury, the defendant in error was hired by Halvorsen, and he was one of the thirteen constituting the gang of men employed under the immediate superintendency of Halvorsen on this work, and subject to his exclusive authority in all matters relating to his duties as a laborer of the company. As a part of the contract of hiring,

defendant company agreed to transport the defendant in error to and from the work. Mr. Halvorsen, in behalf of the company, had charge of the transportation. (Pages 18, 19 and 42.) At the time of the injury the crew of men under Halvorsen's immediate charge, boarded at West Superior, and each morning they reported to Halvorsen, at the latter place, who caused them to be transported on handcars, over the company's road, to the place at which they were to work. In the evening they were brought back in the same manner. Two handcars, belonging to the plaintiff in error, were used by Halvorsen in thus transporting the men, together with the tools and impliments used on the work. This was done for the convenience of the company, as it was necessary to travel several miles over the road each day in going to and from the work. At times, the company carried iron and other material upon the handcars, used in repairing the tracks. These handcars were capable of being propelled at from twelve to fifteen miles per hour, and were often run at that rate of speed by Mr. Halvorsen. (Pages 21, 38 and 49.) *Halvorsen usually occupied a position on the front car near the brakes, and controlled the movements of the cars, while they were in operation.* (Pages 17, 40 and 42.)

On the evening of August 19th, of that year, at the close of the day's work, Halvorsen, as usual ordered his men on board the handcars for the purpose of going home. Halvorsen took his accustomed place on the front car, *as conductor*, near the brake, which enabled him to control the movements and speed of the cars. (Pages 19 and 38.) After the handcars had travelled about two miles that evening, towards West Superior, at a distance of about forty feet apart, the foreman, seeing a woman some distance up the track, suddenly set the brake upon the front car, bringing the same to a sudden stop, *without giving any notice or warning to the men on the hind car.* Pages 20, 31 and 62.)

Halvorsen brought his car to a stop in fifteen feet. At this time the cars were being operated at a speed of from twelve to fifteen miles per hour. (Page 39.) *Halvorsen, from his position on the front car, had an unobstructed view of the track, a distance of six rails, or one-hundred and eighty feet in front of the car.* (Pages 48, 51 and 62.)

The defendant in error was riding upon the front car at this time, and the sudden stopping of the front car caused by the action of Foreman Halvorsen, sent the hind car crashing into it with great force, throwing the front car from off the track, and forward from the stopping point, a distance of about thirty feet. (Pages 39 and 63.)

There was no time or opportunity given the men on the rear car to bring their car to a stop, so as to prevent the collision. The time, from the shutting down of the brake by Halvorsen, on the front car, and the occurrance of the collision, was not more than from one to two seconds. (Pages 21 and 39.) The brakes on the hind car were old and worn, and it took about one-third to one-half more time to stop the hind car than the front one. This Halvorsen knew at this time, having been advised of the defective condition of the hind car some time previous. (Pages 41, 42, 52 and 66.) At the time when the front car was thrown off the track in the collision, the defendant in error was left upon the track and run over by the hind car, thereby breaking his leg.

The foreman, Halvorsen, was guilty of culpable negligence in the manner of stopping the front car. The view up the track was unobstructed for a distance of one hundred and eighty feet, leaving ample time to bring both cars to a stop, if that was necessary. Ordinary care on Halvorsen's part, in bringing the front car to a stop, would have avoided the collision. It wasn't customary to stop the car in such a short distance. On the contrary, the cars going at that rate of speed, were usually stopped in a distance of from forty-five to seventy-five feet. The men on the hind car were given no possible opportunity to avoid the collision. No notice or warning of the sudden stop was given to them, and even if they had been notified, it is very doubtful, in view of the defective condition of the hind car, if the same could have been brought to a stop in so short a distance, and in so short a time; the time from the stopage of the front car and the collision being less than two seconds, according to the statements of the witnesses.

This action is brought for the purpose of recovering damages for the injuries sustained by the defendant in error, because of the culpable negligence of the company's vice-principal, in

conducting the operation of the handcars. Mr. Halvorsen failed to use that care and caution which a man of ordinary prudence, occupying his position, would have used under the circumstances. His failure to give notice or warning to the occupants of the hind car, particularly when he knew that the brake on this car was defective, was gross negligence.

The only important question in this case, for the consideration of the Supreme Court, is whether Halvorsen was a vice-principal of the defendant company, for whose negligence it was liable.

FIRST.

Was the Question of whether Halvorsen was a Vice-Principal, Properly Submitted to the Jury?

The evidence clearly showed that the plaintiff in error had placed the work of repairing the track and lining up three sections of its roadbed, in absolute charge of Mr. Halvorsen. Under his immediate supervision was a force of thirteen men; sometimes working together, and sometimes working in crews. He also had supervision over the regular section foreman, directing the manner in which they were to do the work; in short, having general supervision over three sections of the railroad, some eighteen or twenty miles. It might fairly be said that Halvorsen was in charge of a division consisting of three sections. Halvorsen in behalf of the company *hired and discharged these men, fixed their rate of compensation, and had absolute control over them in all matters pertaining to their employment*; also furnished them with tools and impliments in the performance of this work. No one representing the company, was there to look after the work, or give any orders concerning the same, except Halvorsen. He superintended the work, directed what should be done, where it should be done, how it should be done, and when it should be done. He had sole charge of the transporation of the men to and from their work, and they were under his immediate supervision and control from the time they left West Superior until they stepped

Brabbitts vs. Chicago, & N. W. R. Co., 38 Wis. 297.

Schultz vs. C. M. & St. P. R. Co., 48 Wis. 379.

Hoth vs. Peters, et. al. 55 Wis. 413.

Chicago & Alton Ry. Co. vs. May, 108 Ill. 288.

Mobile & O. Ry. Co., vs. Massey, (Ill.) 38 N. E. 787.

Murphy vs. Smith, 19, C. B. N. S. 361.

Petterson vs. Wallace, 1st Macq. H. L. 748.

Eagan vs. Tucker, 18 Hun. 347.

Whaley vs. Bartlett, et. al. (S. C.) 20 S. E. 745.

Gormley vs. Vulcan Iron Wks., 61 Mo. 492.

Russ vs. Wabash W. Ry. Co. 112 Mo. 45.

Slayter vs. Chapman, (Mich.) 35 N. W. 106.

Smith vs. Oxford Iron Co. 36 Am. R. 535.

Shumway vs. Walworth Mfg Co., 98 Mich, 411. (57 N. W. 251.)

Blomquist vs. C. M. & St. P. Ry. Co., (Minn.) 62 N. W. 818.

Citations from the foregoing cases show the trend of the authorities upon this question:

"Where a master delegates to a superintendent full power to manage the business, *and employ and discharge servants, without interference*, he does not become a fellow servant of a servant in charge of a machine, by helping with it, but is a vice-principal *in whatever he does in furtherance of the business.*"

Shumway vs. Walworth & N. Mfg. Co. 98 Mich., 411 (57 N. W. 251.)

"The foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel with full discretion to control and supervise it (*with power to hire and discharge*) is not a fellow servant with his subordinate employees; and if, in the performance of the work, death or injury results to such an employee, through the negligence of the foreman, the stevedore is liable, although he exercised due care in the selection of the foreman."

Brown vs. Sennett, 68 Cal. 225.

"If the master be not present, and conducts a busines by a superintendent, *who employs and discharges the laborers and employees*, such superintendent is not a fellow servant, but represents the master."

Mitchell et. al. vs. Robinson, 88 Ind. 281.

"Where the employer leaves everything in the hands of a middleman, reserving to himself no discretion, then the middleman's negligence is the master's negligence, for which the latter is liable."

Wharton's Law of Negligence, Par. 229. (Cited with approval in Mullen vs. Philadelphia S. S. Co., 78 Pa. St. 32.)

"In an action against a railroad company for damages, where it appeared that the plaintiff was employed as a train hand and was injured while engaged in digging gravel under the direction of one L. who was engineer, superintendent, conductor and master of the gravel and material train of defendant, *whose business it was to employ and discharge* hands connected with the train, and who had entire charge of this branch of the business, *over a section* of defendant's road; it was held, that the plaintiff and L. were not mere fellow servants, and that plaintiff was entitled to recover of the defendant for an injury sustained on account of the negligence of L."

Dobbin vs. R. R. Co., 81 N. C. 446.

"Owens was the only representative that the railroad company had upon that work. He was really the superintendent of the railroad company for that particular work. As to the laborers on the work he was the railroad company itself. If he had been merely a foreman working under a common employer, a common master, a common principal, along with the other employees, then we suppose under the authorities, he would have been only a fellow servant with the others, and the company would not have been responsible for his negligence towards the others. But he was not merely a foreman working with the rest under a common employer. As to the others he was the employer himself. He was their master, their principal. *He hired and discharged them.* He inspected the machinery used by them to see that it continued in good order, or at least, such was his duty; and he superintended the work generally. They scarcely knew of any other principal or master. All their dealings were with him, except that he did not originally furnish the materials and machinery, and did not pay them. But he had charge of everything after it was furnished, and they could draw their pay only through him and upon his statements and orders."

Kansas Pac. Ry. Co. vs. Little, 19 Kans. 271.

In this case the court held Owens not a fellow servant of the plaintiff, and that the company was liable for Owen's negligence.

"One servant of a corporation to whom is deligated the power of *hiring and discharging other servants*, and in whom the corporation vests the *sole management* and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants *whom he so hires, discharges and controls*, the representative of the master, when exercising such power or control, and is not a fellow servant, nor is he in the same line of employment as the servant he so controls."

Chicago & A. R. Co. vs. May, 108 Ill. 288.

"Where a laborer of a work train is injured by the negligence of one who is both conductor of the train and also foreman of the laborers, having in the latter capacity, *power to hire and discharge the laborers at his discretion*, the question whether they are fellow servants is for the jury."

Mobile & O. R. Co., vs. Massey, (Ill.) 38 N. E. Rep. 787.

"There was some evidence which tended to prove that King the foreman, through whose negligence the plaintiff claims to have received the injury, stood in the relation of superior servant to the plaintiff; that he had control or superior authority over him with respect to the business in which they were employed; *that he had authority to employ and discharge men as he saw proper;* give direction to their movements and their work. If such were true, the plaintiff would be subordinate to King, and King would stand in the place of the defendant; and if the plaintiff, while in that subordinate relation was injured by the negligence of King, without fault on his part, as the testimony tended to show, the defendant would be liable."

Smith vs. Sioux City R. R. Co., 15 Neb. 284. (19 N. W. 638).

"The rule, as we understand it, as now settled by the Supreme Court of this state, is that, while mere grades of rank of employees of a railway company engaged in a common employment, will not destroy the relation of fellow servant, yet, *when one is authorized to employ and discharge servants working under him*, his negligence would be that of the master."

Nix vs. Texas & P. Ry. Co. (Texas) 18 S. W. 571. (Doctrine re-affirmed on second appeal in Texas & P. Ry. Co. vs. Nix, 23 S. W. 328.)

"And that where the general management and control of an industrial enterprise or establishment, is delegated to a superintendent *with power to hire and discharge servants*, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom."

Pantzar vs. Tilly Foster Iron Min. Co., 99 N. Y. 373.

"The assistant roadmaster, under whose supervision plaintiff was working, had general charge of about one hundred and fifty miles of the defendant's road, and controlled all the section gangs along that line. He had full oversight of the work, in which plaintiff was engaged at the time of the injury, and it appeared that plaintiff looked to him as the responsible head from whom plaintiff received his orders, and *who had power to discharge him*. Held, that he was not a fellow servant of plaintiff, but represented defendant, who was liable for his negligence while in the line of his duty."

Harrison vs. Detroit L. & N. Ry. Co. (79 Mich. 409) 22 N. W. 1034.

In the case of Patton vs. Western N. C. R. Co., 1 S. E. 863, the supreme court of North Carolina, in discussing the question of fellow servant, on page 867 says: "This case is not like the ordinary one of injury done by one fellow servant, acting as foreman or leader of several or many laborers, to one of his fellow servants. The complaint expressly alleges that the section master named was agent and servant, and had full power and authority of the said defendant, to *hire* and *discharge* hands and servants in that behalf, on said section, and who was then and there the superior of said plaintiff in that behalf etc. Evidence was introduced on the trial to prove this material allegation, and the jury found by their verdict that it was true. So it appeared that the section master in this case was not simply a fellow servant of the plaintiff, but as well the agent of the defendant, charged with authority to *employ, control and command* the plaintiff as to the labor he should do on the railroad of the defendant, while he was in its service, *and to discharge him* from such service, — just as its president or other leading executive officers might have done; and the defendant must therefore

be held liable for his misfeasance in the course of his agency, just as if the same had been done by its chief executive officers."

"Where a section boss has full power to *hire, command and discharge* those working under him, he is not a fellow servant."

Logan vs. N. C. R. Co., (N. C.) 21 S. E. 959.

"An assistant roadmaster in control of a gang of men, and with power to direct their work *and discharge any of them*, is a superior servant for whose negligent acts the master is liable."

Palmer vs. Mich. Cent. R. Co. (Mich.) 53 N. W. Rep. 397.

"Evidence that a master, instead of supervising the construction of a gas holder in another state, sent another person to attend thereto, who had full charge of the work, tends to show that such person was his master's vice-principal in the work."

Whaley vs. Bartlett, (S. C.) 20 S. E. 745.

"One who has the power to *employ and discharge* laborers in his department is a vice-principal as regards the duty to warn such laborers of special risks in their employment."

Ft. Smith Oil Co. vs. Slover, (Ark.) 24 S. W. 106.

"This crew of masons and laborers were under the immediate supervision and control of a foreman named Enger. *He hired and discharged them as became necessary*, told them where to work and what to do.—— Enger the foreman, when directing where and how the platform was to be built, represented the defendant company, became a vice-principal; and it conclusively appeared that the company was responsible for his negligence."

Blomquist vs. C. M. & St. P. Ry. Co., (Minn.) 62 N. W. 820.

"Where a master gives over the whole charge of his business to another, the person to whom such power is deligated stands in the master's place to all subordinates, and his negligence is chargable to the master."

Woods Master and Servant, 764, Sec. 390.

"It is now too well settled to admit of controversy, that a master is not liable to his servant for injuries caused by the negligence of a fellow servant, in the same general employment or business. It is just as well settled that under certain circumstances *the whole power and authority of*

the master is vested in an employee or servant, in which case the negligence of such employee is the negligence of the master. This occurs most frequently when the master is a corporation aggregate and can only perform its functions by agents or servants."

Brabbitts vs. C. N. W. Ry. Co., 38 Wis. 297.

Schultz vs. C. M. & St. P. Ry. Co., 48 Wis. 379.

"If the master relinquishes all supervision of the work and entrusts not only the supervision and direction of the work *but the selection and employment of laborers* and the procuring of materials, machinery and other instrumentalities necessary for the service, to the judgment and discretion of a superintendent, in such case the latter becomes a vice-principal."

Hoth vs. Peters, et. al. 55 Wis. 413.

The case of Russ vs. Wabash Western Railroad Co., 112 Mo. 45, (S. C. 20 S. W. 472) was an action brought to recover damages caused by the negligence of the section foreman in operating a handcar, and the court, in discussing the question of defendant's liability for the negligent act of its foreman, says:

"There can be no doubt but the foreman was the vice-principal of the defendant, for he had the power conferred upon him to *employ and discharge* the men under him, and he had *full control* of the work and movements of the men. In the performance of the duties devolved upon him as foreman he was not a co-servant of the plaintiff, but was a representative of the defendant. His negligent acts, done in the performance of duties devolved upon him as foreman, were the negligent acts of the defendant, and for such negligence the defendant is liable."

The list of like cases could be extended without number but the foregoing will amply show the trend of decisions upon this question.

The plaintiff in error certainly had placed the entire charge of this branch of its business into the hands of Mr. Halvorsen, exercising no discretion and no oversight of its own. All the powers that are essentially the attributes of a master, were vested in Mr. Halvorsen, as far as defendant in error was concerned with regard to this branch or portion of defendant's business. Therefore I contend that under the general rule above referred to, recognized by all the courts, with perhaps one exception, that of Massachusetts, Halvorsen must be held to be the vice-principal and representative of the plaintiff in error, and not a fellow servant.

Judgment should be affirmed, however, under the American Rule, that servant in command is not a fellow servant with his subordinates.

"Under the rule first declared in Ohio and since followed by the courts of last resort in Connecticut, Virginia, West Virginia, Kentucky, Tennessee, Missouri, Illinois, Nebraska, Louisiana, North Carolina, Georgia, Kansas, Texas and California, a servant who is entrusted with the general management of the master's business, or of any seperate portion of that business, and is vested by the master with command and control over other servants engaged in that business or department, is not a fellow servant with those who are employed under him, and subject to his orders. He acts as the master's substitute; and when the master choses to delegate his power of control or management to another person, it is held by these courts, that he is liable for the negligence of such representative, while acting as such, to the same extent as if it were his own."

1st Sherman & Redfield on Negligence, Par. 226.

It might be well to note that in addition to the states mentioned by Sherman & Redfield, as having adopted this doctrine, the Supreme Court of the State of Minnesota has recently swung practically into line. (See Blomquist vs. C. M. & St. P. R. Co. decided April 9th, 1895. 62 N. W. 818.) In this case the sole question determined by the court was whether the foreman, Enger, was a vice-principal or a fellow servant. It appeared from the evidence that Enger had full power to hire and discharge the men and some importance might be attached to that fact, still the court said: *"Enger, the foreman, when directing where and how the platform was to be built, represented defendant company, became a vice-principal"* This decision in effect overruled the noted case of Lindvall vs. Woods, 41 Minn. 212.

The judgment of the circuit court in the case at bar, was affirmed by the circuit court of appeals on the authority of the Ross Case.

"The foreman of an extra gang of track repairers, whose sole duty it was to supervise the work of track repairing over some eighteen or twenty miles of road bed of a railroad company, to hire the men necessary to do

the work, and to direct the operation of the force so employed, is a vice-principal, for whose negligence the railroad company is liable, where a workman in said gang was injured, while under his orders."

N. P. Ry. Co. vs. Peterson, 57 Fed. Rep. 182.

Judge Thayer in delivering the opinion of the court in this case said, on the question ot vice-principal: "The test applicable to the determination of that question is not whether the person has charge of an important department of the master's service but whether his duties are exclusively those of supervision, direction, and control over a work undertaken by the master, and over subordinate employees engaged in such work, whose duty it is to obey, and whether he had been invested by the common master with such power of supervision and management. The other view, that the question whether a person is a vice-principal, is to be determined solely by the magnitude or importance of the work that may have been committed to his charge, is open to the objection that it furnishes no practical or certain test by which to determine in a given case, whether an employee has been vested with such departmental control, or has been so lifted up in the 'grade and extent of his duties' as to constitute him the personal representative of the master. That this would frequently be a difficult and embarrassing question to decide, and that the courts would differ widely in their views, if the doctrine of departmental control was adopted, is well illustrated in the case of Borgman vs. Ry. Co., 41 Fed. Rep. 667-669. We are of the opinion, therefore, that the *nature and character* of the respective duties devolved upon and performed by persons in the same common employment, should in each instance determine whether they are, or are not fellow servants, and that such relation should not be deemed to exist between two employees, where the vocation of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management. The views which we have thus expressed concerning the proper interpretation of the *Ross Case* were substantially stated by this court in the recent case of Woods vs. Lindvall, 48 Fed. Rep. 62. We believe that they are also

in accord with the view generally entertained by other courts, and by the profession, concerning the scope and effect of that decision. Sherm. & R. Neg. (4th Ed.) Par. 226."

It should be noted that the circuit court of appeals takes the broad ground that the "*nature and character* of the respective duties, etc.", should in each instance determine whether they are fellow servants. Upon the facts in the case at bar, the decision of the circuit court of appeals is certainly sustained by the great weight of authority in this country. Halvorsen was the general representative of the plaintiff in error, so far as Peterson was concerned, it having delegated *all* its power and authority and the performance of its duties, as master, to Halvorsen; he, therefore, must be held to be a vice-principal, and his negligence would be the negligence of the company.

"The foreman of raiload repair shops, to whom is entrusted the task of restoring wrecked trains with the assistance of a crew of men selected from the workmen in the shops and the section hands, who has charge of all the men engaged in restoring the train is, when in charge of a wreck, a vice-principal, for whose negligence the railroad company is chargable to a workman injured while under his orders."

Borgman vs. Omaha & St. Louis Ry Co. 41 Fed. R. 667.

Although it may be said that the opinion of Judge Brewer in the Borgman Case, tends to narrow the rule of liability, nevertheless, the case at bar fully complies with the requirements of that decision. It seems to me that the concurring opinion of Judge Shiras in the Borgman Case, applies the more correct test in determining whether, in a given case, parties occupy the position of co-employees. "The test of responsibility is not the question whether the person guilty of negligence is at the head of some recognized department of the corporate business. Responsibility on the part of the company arises out of the fact that the power of control, management and direction has been conferred upon the one, touching the special business in hand, and the duty of obedience is exacted from the others. The one is charged with the duty of controlling, managing, directing; the others with that of obedience and performance; and the relation thus constituted is not that of co-employee, but that of the representative of the company and its employees. Under such circumstances the railway company

looks to the person who exercises the power of control and management, whether he be called a superintendent, manager, roadmaster, conductor, boss, foreman or what not, for the proper performance of the special work placed under his charge, and requires of those working under his direction, obedience to his orders. Where obedience is thus exacted, responsibility is incurred.—When the work to be done is of such a nature that supervision thereof is required, and the company confides to one the duty of exercising control and management, and demands of others obedience to his behests, it can not be said that all occupy the same position towards the company, and towards each other. In the management of the business, the one speaks for and represents the company, and, in carrying out the orders or obeying the direction of the one, the others are obeying the commands of the master. For negligence in the exercise of the duty of supervision and control, which is a duty of the master not to be evaded, the corporation is responsible to one injured thereby, unless he is also guilty of negligence contributing to the injury."

THE DOCTRINE OF THE ROSS CASE OUGHT TO BE DECISIVE OF THIS CONTROVERCY.

"There is, in our judgment, a clear distinction to be made in their relation, to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is realy that of direction and superintendence. A conductor having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters and other subordinates employed. He is in fact, and should be treated as the personal representative of the corporation for whose negligence it is responsible to subordinate servants."

Railway Co. vs. Ross, 112 U. S. 377.

It is claimed that the cases of Coyne vs. Railway Co. 133 U. S. 370. and Railroad Company vs. Baugh, 149 U. S. 368, narrow the scope of the Ross Case. In the Coyne Case, supra, the Court expressly determined that the injuries were not caused by the negligence of the foreman, McCormis. The

court nowhere intimates in that decision that the foreman was not a vice-principal, for whose negligence, if the cause of the injury, the defendant would not be responsible. In the Baugh Case, supra, the train consisted only of an engine, and was in charge of the engineer, who acted also as conductor, and the fireman was assisting him. The engine was running wild, and had to keep out of the way of the regular train. The fireman was injured in a collision with that train. He knew, as well as the engineer, the time of the regular train, and that the engine was running without orders. He knew as much about the situation and the danger to be encountered, as the engineer. *He and the engineer had knowingly entered upon a joint venture into danger and they stood on an* **equal** *footing.* Justice Brewer, in the closing opinion of the court, is disposed to hold that the fireman had voluntarily assumed the risk and hence could not recover.

"*Baugh, equally with the engineer, knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.*"

If the doctrine of assumption of risk is to be enforced, then the decision in the Baugh Case must rest upon that principal.

In the case at bar it matters not whether the liability of the plaintiff in error is based upon the superior servant doctrine or upon that of departmental control, for the facts in this case clearly show that not only was Halvorsen a superior servant of the railroad company, being vested with all the power, authority and discretion of the master, but also that as such superior servant and representative of the plaintiff in error, he had control of a distinct department or portion of defendant's business. His position gave him entire control over this department, and was seperate from all other general offices. The services in which he was engaged required experience and skill and were attended with danger.

Stephenson vs. C. M. & St. P. Ry. 47 N. W. 1068.

In this case the court held, "While it may not be so dangerous to ride upon or operate a handcar, as to ride upon or operate a locomotive or a train propelled by locomotive, it must be apparent that there is danger in it, and that such danger is one of those incident and peculiar to the business in which handcars are used."

Not only ~~out~~ repairing and lining up this portion of defendant's road required skill and experience, but conducting the operation of the handcars, morning and night, made it necessary that the person in charge should possess sufficient knowledge and skill to safely transport the men to and from their work.

IS NOT THE REAL QUESTION ONE OF AGENCY?

So much has been said and written by able jurists upon the question of fellow servant; it has been discussed *pro* and *con* in every conceivable manner, that little, if any, additional light can be thrown upon the subject.

It seems to me that some of the courts have spent too much effort in determining the exact grade or name by which the superior servant is to be recognized. It is not of much importance what name you give to the grade or position of the superior servant, for whose acts the master ought to be held responsible, whether it is vice-principal, superior servant, superintendent, foreman, or servant in departmental control. The real question to my mind, is one of agency, and the extent and scope of that agency.

The law has always recognized the right of a person to act through agents, and to hold the principal responsible for the acts of the agent done within the scope of his agency or employment, and there seems to be no great difficulty on the part of the courts to determine the liability of a principal for the acts of the agent done in the course of his employment, in all the ordinary business pursuits, until we come to the question of "master and servant."

Viewing this question from a standpoint of principal and agent, then the real question in any personal injury case, by which to determine the liability of the master, is the *extent and scope* of that agency. What was the vice-principal, superintendent, foreman, section boss, etc. to do? What power and authority had the master vested in his agent? Was the agency limited or unlimited, as to the business in hand? These seem to me to be the vital questions to be passed upon in determining the master's liability, and they would have to be ascertained and determined from the facts in each particular case. With this suggestion in mind, let us inquire.

FIRST:—What are the powers and duties of the plaintiff in error, as principal or master?

SECOND:—Who exercised those powers and who performed the duties?

As principal or master, the plaintiff in error had power to enter into the contract of hiring, fixing the rate of compensation and character of employment; to command what should be done and when and how such work should be performed; to discharge the servant at its discretion. These are substantially the powers of the master.

The duties of the master require him to provide the servant with safe and suitable tools and impliments and machinery with which to do the work in hand; to provide suitable and competent fellow servants; to provide a safe place in which to perform the work required by the master, and to promulgate and devise proper rules and regulations for the performance of the work and to do the same in a reasonably safe manner. These are substantially the duties of the master.

To whom had the plaintiff in error delegated the performance of its duties and vested with all powers of the master? There can be no doubt but what Halvorsen was that person, and hence, became the general agent of the plaintiff in error in all matters pertaining to the employment of Peterson, and the work in hand, and the plaintiff in error would be responsible for the acts of Mr. Halvorsen, his omissions aud commissions within the scope of that agency.

As a part of the contract of hiring the plaintiff in error was bound to safely transport the plaintiff to and from the work (see complaint and evidence). Halvorsen had charge and control of the transportation, as agent and representative of the company. He not only furnished the vehicles or conveyances, but was the conductor and controlled the movements and operation of the handcars used for that purpose. No one else had charge of or controlled these cars, and none of the other men had any right or authority to interfere with the operation of the same. Thus, Mr. Halvorsen, while performing the duty of the master towards this defendant in error, was negligent therein, by reason of which he was injured.

If I were to hire a number of men to do a certain work and assume personal supervision, and if one of those men were in-

jured in the work because of my negligence, in the management thereof, there would be no question about my liability if he was free from fault. Can I relieve myself of liability by appointing an agent to do that which I was doing personally, or by delegating my power of control and management, can I partially relieve myself of responsibility? There is no precedent in any of the other branches of the law of principal and agent, upon which to found a rule of non-liability in such cases, and there is neither justice nor reason in such a rule.

There is no more hardship in holding that the principal should be responsible for the negligence of his agent, whom he has placed in absolute charge of his servant, than to hold the principal liable and responsible for the negligence of the agent in driving a span of horses upon a public throughfare whereby a fellow traveller was injured. There is greater reason for holding the principal liable in the first instance than in the second. He clothes the agent with all that power and authority vested in himself, and exacts from his servants obedience to the commands and behests of that agent.

It might be said that it is not one of the personal duties which the master owes to his servant, to exercise supervision and control, and therefore, when the master has only delegated the power of supervision and control, he is not liable for the negligent exercise thereof. Assuming for the sake of the argument, that this is not a personal duty, nevertheless, no one will dispute but that the master possesses this power, and has the right to exercise it if he sees fit, and if he does, the law imposes upon him the personal obligation to exercise this right with due regard to the safety of his servant; and if he is negligent in the exercise of such supervision and control by reason of which his servant is injured, then it would be considered that he is liable therefore If he exercises the power of control, and management either in person or by his authorized agent, he becomes responsible for the consequences resulting in the negligent exercise thereof. *By exercising that power* he must be held to have placed himself under a personal obligation to his servant to do it in a safe manner, and then at least, it will become a personal duty, for the proper performance of which the law will hold the master responsible. Under those circumstances it matters not whether to supervise and control is regarded as one of the personal duties

that the master owes to the servant, because, if the master assumes to exercise this power, either in person or by his agent, he must be held to be personally responsible for the negligent use of that power.

"There seems to be no well-settled rule that classifies the agents and the servants of a common employer, whether natural or artificial, first into such as have authority to represent, act for and in the place of, the employer in respect to the persons, business matters, and things wherewith they are charged: and, secondly such as have no such authority, but are merely fellow servants. But, without regard to such rule, there is no reason why such authority may not be specially conferred upon any such agent or servant. In this case the burden of proving the authority, its extent and compass, by competent evidence, would rest upon the party alleging it, unless the nature of the agency or employment implied its existence and extent. Thus an employer might confer upon a particular laborer charged to do a particular sort of service, but who simply, by nature of his employment, would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or non-feasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent, act for and in the place of, his employer in the business designated, and within the compass of power conferred. And so, in the case before us, although the section master or foreman might not have had authority, arising from the nature of his employment, to bind the defendant for his acts towards and his commands to his fellow servants, yet, if the defendant conferred upon him power and authority to employ laborers,—fellow-laborers with himself,—to work on the section of railroad wherewith he was charged and authority to superintend them, to give them orders and commands in the line of the work to be done, which they were bound to obey, and to discharge them from such employment, in his discretion, as alleged in the complaint, and as the evidence introduced at the trial tended to prove, the defendant would be liable for his misfeasances and non-feasances in the course of the exercise of his authority thus conferred by it. *This is so upon the plainest principles of law applicable to and governing the relations of principal and agent towards each other and third persons.*"

Patten vs. Western N. C. R. Co., supra.

I believe there is not a single authority of any pretence to respectability or standing in this country, but that it has held and still holds, that where the master delegates *all* his power

and authority, and the performance of his duties to ~~and~~ any of his employees, that such servant becomes a vice-principal, and his negligence in the line of his employment, is the negligence of the master, and hence, as far as the case at bar is concerned, we do not have to rest the rights of the defendaut in error upon any special rule or the so called superior servant doctrine.

HALVORSEN WAS NEGLIGENT IN THE PERFORMANCE OF A DUTY WHICH THE PLAINTIFF IN ERROR OWED TO MR. PETERSON.

As I have before remarked, the plaintiff in error, as a part of its contract of hiring, was to safely transport the plaintiff to and from the work. It is so alleged in the complaint, (Record page 9) and the evidence sustains the allegation. Halvorsen had charge of the transportation. He directed and controlled the movements of the cars. There was no one else, on behalf of the plaintiff in error, exercising any supervision or control in the matter. The negligence of Halvorsen was in performing a duty which the plaintiff in error owed to Mr. Peterson, and under the general rules laid down by the courts, repeated in the Baugh Case, the master is liable for negligence in the performance of any of the duties which he owes to the servant, whether such duties are performed by himself or by an agent. Plaintiff in error had recognized its obligation to Mr. Peterson to transport him and and the other employees, and entered upon its performance. It was negligent in its performance for which it ought to be held responsible.

This covers all that I care to say on the first, second and third assignment of errors, which in fact raise the only important question in the case.

SECOND.

THERE WAS NO ERROR IN REFUSING TO GIVE DEFENDANT'S THIRD, FOUTH, FIFTH AND SIXTH REQUESTS.

The third, fourth and fifth special requests of the defendant were not given because they were fully covered by the charge in

chief, and the court declined to repeat to the jury what it had already told them in the following language: "If you find Halvorsen was not a fellow servant of the plaintiff, but represented the company, then, as was well observed by the counsel for the defendant, the question under the evidence in the case, for determination is, was the injury the result of the negligent act of Halvorsen, the defendant's agent, who was riding on and had charge of the front car, *or was it the negligence of the hands who were on and operating the hind car*? *If the negligence of the men on the hind car occasioned the accident, the defendant is not liable.* You have heard the evidence relating to the functions and duty of Halvorsen and the hands at work under him, *and upon a full and fair consideration of all that evidence you will determine whose negligence occasioned this accident.*" (Transcript of Record, pages 68 and 69).

The fourth request was obnoxious in that it assumed as a conclusion, that if a rule of the company existed which required the men on the rear hand car to keep at a proper distance from the front car, to avoid a collision, then there could be no possible liability on the part of the plaintiff in error, for the consequences of the collision which occurred. This request ignored the prominent fact in the case that the front car was stopped unexpectedly by the company's vice-principal, who knew that the two cars had travelled for some two miles, about forty-five feet apart, and that these two hand cars were being operated under the immediate supervision and control of Halvorsen, who had a right to regulate their speed and signal them to stop or start at his pleasure. Assuming that there was such a rule, which does not appear, however, except that there was a general understanding to the effect that the two cars should run at a proper distance apart, what difference would that make in the result of this case? The cars had already travelled some two miles, at this same distance apart, with Halvorsen's approval, and therefore it must be presumed at his direction, and if there was any negligence or violation of the alleged rule it must be charged up to the company's vice-principal and not to the men who were simply obeying his orders. The only evidence in regard to any rule is the testimony of Halvorsen that he told the men a week or two before the accident, not to run any closer than five or six rail lengths. Giving this order of the vice-principal the force

and effect of a rule, promulgated by himself, bearing in mind that Halvorsen was in charge and controlled the movements of the two cars, if it was competent for him to order them to keep that distance apart in the first instance, then he had the power and authority to order or permit the men to run at a shorter distance apart. The two cars having travelled two miles immediately preceding the accident, at that same distance apart, with the full knowledge of Mr. Halvorsen, it must be presumed that the men were obeying his orders and operating the hindcar with his entire approval.

Counsel for plaintiff in error urged in the court below, "That there was evidence that it was not customary to warn the people on the rear car when the front car stopped" but failed to point out any such evidence in the record. There is no such evidence. But assuming that such evidence appeared in the record, it would only tend to prove negligence in the railroad company, in failing to do that which any man or common prudence would consider necessary, in such a dangerous occupation. The operation of hand cars is attended with considerable danger, and a man in charge thereof, as Halvorsen was, in the capacity of conductor, would be in duty bound, to exercise at least such care as a man of ordinary inteligence would, under similar circumstances, for the safety of the servants in his charge. If it was necessary to bring the front car to a sudden stop then it was Halvorsen's duty to signal the hind car, and the men on the rear car had a right to assume that Halvorsen would perform this duty. Halvorsen had one-hundred and eighty feet in which to bring both cars to a stop, according to his evidence, without coming up to the place where this woman was walking, *outside of the track*. (Pages 61 and 62 record;) and assuming that it was necessary to stop this car, there was no earthly reason for stopping it in fifteen feet in the manner that he did, without giving any warning or signal to the men on the hind car, who, he knew were only forty-five feet in his rear travelling at the rate of from twelve to fifteen miles per hour, *on a car that had a brake that was to some extent worn, and not capable of effective work*. It was an act of culpable negligence on his part, and the learned court certainly submitted to the jury very fully the question of any negligence on the part of the men on the hind

car, and the Circuit Court of Appeals was of the same opinion. (Page 78 record.) Hence I contend that the fourth, fifth and sixth assignments of error are not well taken.

THIRD.

DEFECTIVE BRAKE.

The seventh assignment of error relates to the refusal of the court to instruct that if the accident was caused by the defective brake on the rear car, then the plaintiff cannot recover.

The court will note that on page nine (9) of the record the amended complaint alleges, "That the second or hind car of the defendant was defective and out of repair, in this that the brake thereof was worn out and of little use, and that by reason thereof the speed of said second car coming after the car upon which plaintiff was being transported, could not be controlled by the operators, and the same was insufficient and unsuitable for the purposes for which the same was used by the defendant etc."

Plaintiff insisted at the trial that, knowing the defective condition of the hind car, it was Halvorsen's duty to exercise greater care in stopping the front car, and in giving the men on the rear car notice or warning of his intention to stop. The hind car was only defective to the extent that the brake was worn, and hence it could not be stopped as readily as the front car. If the brakes on the hind car had been perfect, it is barely possible, but not likely, that the collision could have been avoided, but it appeared *conclusively* from the evidence, that the proximate cause of the accident was Halvorsen's manner of stopping the front car. Under the circumstances of the case we might fairly conclude that the defective brakes on the rear car contributed indirectly to the accident, because it could not be readily controlled; but if Halvorsen had exercised ordinary care in bringing the front car to a stop, the collision would not have occurred.

By the amended complaint, charging that the brakes on the rear car were defective, the trial court was not warranted in excluding from the consideration of the jury the defective condition of the hind car in connection with Halvorsen's conduct. It was one of the duties of Halvorsen to furnish suitable and safe instrumentalities, and to see that they were kept in safe repair,

and he so testified; and if he failed to perform that duty and the consequence of his failure in that respect, contributed to the injury, that would not relieve the company from liability.

I submit that no error was committed by the trial court, and that its charge upon the question of fellow servant is in harmony with the principal current authority of this country, and therefore the judgment of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

HENRY J. GJERTSEN.

Attorney for the Defendant in Error.

Minneapolis, Minn.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

No. 153.

THE NORTHERN PACIFIC RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

SAMUEL PETERSON,

DEFENDANT IN ERROR.

REPLY BRIEF OF DEFENDANT IN ERROR.

HENRY J. GJERTSEN,
Of Counsel for Defendant in Error.

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REPLY BRIEF OF DEFENDANT IN ERROR.

There are only two questions which ought to be considered by this Court upon this appeal. *First*, does the amended complaint state facts sufficient to constitute a cause of action? *Second*, was the question of whether

Halverson was the vice-principal properly submitted to the jury?

These two questions are covered by the first and second assignments of error. At all events, the only question that can be urged under the second assignment, is whether the amended complaint states a cause of action; the remaining assignments, numbers 3, 4, 5 and 6 are covered by the general charge of the Court and their determination calls for an investigation of all the evidence which is not before this Court. The 7th assignment relating to the refusal of the Court to charge the jury with reference to the defects in the second-hand car is not based upon any exception taken to the action of the trial court, and hence cannot be made a subject of review.

I desire especially to call the Court's attention to the fact that the bill of exception is *not* certified to by the trial judge as containing *all* the evidence and proceedings had at the trial of the action (page 71 of the Record); and as a matter of fact, the bill of exception does not contain all the evidence, only so much as would fairly show the relation which Halverson sustained to the defendant company in order that that question might be properly determined on review. *In the absence of a settled case or a bill of exceptions containing all the evidence, the Court must presume that all the material allegations of the amended complaint were sustained by sufficient evidence at the trial.*

We submit that the amended complaint (see pages 8 and 9 of the Record) states sufficient facts to constitute a cause of action. The acts of negligence charge in the pleading are, *first*, incompetency of Halverson as vice-principal; *second*, want of repair and defective condition of hand-car and that same was unsuitable and insufficient for the purpose for which it was used and notice of these facts to the defendant; *third*, the careless and negligent manner in which the car was operated by the Company's vice-principal; *fourth*, because of the incompetency of Halverson and his careless and negligent manner of handling the

cars in his charge and because of the defective appliances, the defendant was injured.

The Court will notice that the amended complaint was made and filed after the trial had progressed for some time. (See page 42 of the Record). These charges of negligence, if proven, certainly entit'e the plaintiff to recover; and as I have before stated, we must presume that the evidence fully sustains all the material allegations of the amended complaint—the bill of exception not being certified to by the trial judge as containing all the evidence.

SECOND.

I desire to call the attention of this Court to the full scope of the Court's charge upon the question of Halverson's relationship to the defendant company. Under that charge the jury was bound to find, *first*, that Halverson was the foreman of an extra gang, or agent of the company; *second*, that as such agent he had charge and the superintendancy of putting in lining and repairing three sections of the defendant's road; *third*, that he hired the gang of hands to work for the company; *fourth*, that he had exclusive charge and management of the men in all matters pertaining to their employment; *fifth*, that he was invested with authority to discharge the man at his discretion; *sixth*, that the plaintiff was one of a gang of hands so hired by Halverson and was subject to the authority of Halverson in all matters pertaining to his employment; **seventh,** *the injury complained of must have been sustained through the negligence of Halverson while acting in the course of his employment as such foreman or agent of the company*— (Last item of special importance.)

All these conditions were found to exist by the jury and this Court is bound by the verdict of the jury upon these questions of fact. As I have before stated, the purpose of the bill of exception was merely to show so much of the evidence as bore upon the relationship of Halverson to the

Company and upon that question it appears from the bill of exception that whatever may have been his title Halverson was not a mere boss or overseer, because first, his jurisdiction extended over three sections of the defendant's road; second, he hired the men, fixed their rate of compensation; third, he furnished all tools and appliances and saw they were kept in repair; fourth, he gave all orders and direction and had *exclusive* charge of all matters pertaining to the employment of the men; fifth, he had authority to discharge the men at his discretion, kept their time on which they were paid; sixth, he had charge of the transportation of the men and personally acted as conductor in the operation of the hand cars. What greater power and authority would the master have?

For these reasons, I contend that the company had invested Halverson with the whole power and authority of the master and hence was such a general agent that the defendant company was bound by whatever he did in the course of his work and that the company would be responsible for his negligence within the scope of his employment to the same extent as if the negligent act was done by the master himself.

Should the Court differ with me in this conclusion, then I submit the following proposition for the careful consideration of the Court:

The amended complaint states "that as a part of the contract of hiring, the defendant engaged to carry the plaintiff to and from his work upon the defendant's road as the occasion should require, in a safe and proper manner." The defendant, having as a part of its contract of hiring, assumed this obligation and taken upon itself the performance of this duty, was bound to exercise the same degree of care in its discharge as any positive duty recognized or imposed by law. Halverson, while in charge of the transportation controlled the movements of the cars, acted as conductor, and performed all the duties which the master had assumed towards the plaintiff, and hence, if he was negligent in the performance of a duty, whether owed by

virtue of relation of master and servant, or one specially assumed under the contract of hiring, the master would be liable. Then consider for the sake of the argument, that in this case there was no obligation on the part of the defendant, arising as a matter of law because of the relationship, to supervise the transportation of the men, nevertheless, it will not be seriously questioned but that the company could voluntarily assume to do so, and did it so assume, it was bound to exercise the same degree of care in the discharge of the duty so assumed, as any positive duty imposed by law. Note the fact, that under the instruction of the court, the jury, from the evidence, found that the injury complained of was sustained through the negligence of Halverson while acting in his capacity as such foreman.

The fallacy of council's argument, that the setting of the brake alone caused the accident, and that that was an act of a servant, a workman, a laborer—and not in the exercise of any function as foreman, and hence not in the the discharge of any duty which the railroad company owed to the laborers, is apparent when we stop to analyze the circumstances of the collision, which caused the injury.

It is true, that the naked act of setting a brake upon a car is purely menial, and so would nearly every specific act be characterized, where the master takes personal part in the operation of his work; but he would not thereby lessen his liability for want of care. But in this case, the *act* of *setting* the brake, did not of itself cause the injury. It is not so charged in the amended complaint. It was the surrounding circumstances attending the act of setting the brake which brought on the accident; these were the very matters which Halverson, in his representative capacity, was bound to know and appreciate.

For the sake of argument, I might concede, that notwithstanding the specific contract to transport plaintiff safely as alleged in the complaint, had there been any danger in ordinarily stopping a hand-car by the brake,

such dangers would have been assumed by the plaintiff; but this is not such a case.

Let us analyze the combination of circumstances, over which plaintiff had no control, and which caused this serious accident:

First. Two hand-cars on the same track, going in the same direction.

Second. Defective condition of the hind car.

Third. Speed at which the cars were operated.

Fourth. The distance apart at which the cars were allowed to run by Halverson.

Fifth. Independent motive power on each car controlled only by Halverson.

Sixth. Failure to give any notice or warning to the men on the rear car of intention to stop the first car.

Seventh. Halverson's incompetency as foreman.

Eighth. The manner in which Halverson caused the brake to be set.

I care not who set the brake; that act alone and of itself would have been perfectly harmless, except for the first six mentioned elements, and Halverson was the only person whose duty it was to carefully weigh and consider those matters before setting or causing the brake to be set. The plaintiff was neither in a position to weigh these matters, nor could he have profited thereby if he had done so.

Plaintiff was entitled to a safe position on the hand-car, and it was Halverson's duty to see to it that his position continued safe.

The already limited protection which the law affords the servant for injuries sustained in the master's service, ought not to be further curtailed, in this enlightened and progressive age, a time when the spirit of equity and good conscience is presumed to guide the action of our courts.

Halverson being invested with the whole power and authority of the master was fully authorized to assume the obligations in regard to transportation alleged in the

complaint, in addition to the positive duties recognized as a matter of law, and in the discharge of such assumed duties, the responsibility for his negligence would not be lessened.

RESUME.

The defendants motion to direct the verdict, cannot be reviewed in this court, in the absence of a settled case or bill of exception certified to by the trial judge as containing all the ~~elements~~ evidence.

The argument of counsel urging that the plaintiff was guilty of contributory negligence, has absolutely no foundation to stand upon. The evidence showed that the time between the setting of the brake and the collision, was from one to two seconds, which certainly gave complainant no opportunity to avoid the collision. (See pages 21-39 of Record).

The question as to the negligence of the fellow-servants on the hind car, was fully covered by the general charge of the Court.

The argument of counsel urging that Halverson was guilty of no negligence, must be based upon the assumption that whatever we have of Halverson's evidence in the bill of exception must be presumed to be true, notwithstanding that he was contradicted by numerous witnesses, and the verdict of the jury upon that point. The first fourteen pages of counsel's brief is devoted principally to questions of fact, which were fully submitted to the jury.

In the brief filed, I have not urged that the bill of exception did not contain all the evidence, and was not so certified to by the trial court, for the reason that at the time of preparing my brief I did not deem it necessary, but after examining the brief of counsel for the plaintiff in error, calling upon this Court to pass upon disputed questions of fact which has been decided by the jury. I would be derilict in my duty towards my client did I not bring this feature of the case to the attention of this Court.